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Public Law Values in a Privatized World

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Article

Public Law Values in a Privatized World

Laura A. Dickinson†

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I. INTRODUCTION

Domestic law scholars and policymakers have long debated issues surrounding privatization.¹ Over the past twenty years, the U.S. government has increasingly contracted with private organizations to perform a variety of functions—from health care,² to education,³ to welfare,⁴ to prison

† Professor, University of Connecticut School of Law. This Article was first presented at a Joint Conference on Contemporary Issues of International Law, sponsored by the American Society of International Law, in The Hague, Netherlands in July 2005. The ideas contained here were also presented at a faculty workshop at George Washington University Law School, and at a conference on “The Future of the State in International Law,” held at the University of Virginia School of Law. I acknowledge the participants in all three events for helpful comments and suggestions. In addition, special thanks go to Dan Bedansky, Paul Schiff Berman, Rosa Brooks, Nestor M. Davidson, Robert W. Gordon, John Harrison, Paul Kahn, Harold Hongju Koh, David Luban, Jordan Paust, Leila Sadat, Steven Schooner, and Dinah Shelton for their useful contributions to this draft at various stages along the way. This Article was selected for inclusion in the Yale/Stanford Junior Faculty Forum, held at Yale Law School in June 2006.

1. A recent symposium issue of the *Harvard Law Review* even goes so far as to declare that we are in “an era of privatization.” See Symposium, *Public Values in an Era of Privatization*, 116 HARV. L. REV. 1211 (2003).

2. See generally THE PRIVATIZATION OF HEALTH CARE REFORM: LEGAL AND REGULATORY PERSPECTIVES (M. Gregg Bloche ed., 2003).

management.⁵ While advocates of privatization have generally argued for the practice on efficiency grounds,⁶ critics have worried that, even if privatization may cut financial costs, it can threaten important public law values.⁷ Because many constitutional norms protect individuals only from government misconduct,⁸ and because courts have been largely unwilling to view such norms as applicable to private contractors,⁹ these critics have argued that privatization will dramatically reduce the scope of public law protections in the United States.¹⁰ Others have sought a middle ground, arguing that privatization offers a means to extend public law values through the government contracts themselves, in a process of “publicization.”¹¹

To date, however, none of these scholars has squarely confronted the growing phenomenon of privatization in the international realm or its impact on the values embodied in public international law. Yet, with both nation-states and international organizations increasingly privatizing foreign affairs functions, privatization is now as significant a phenomenon internationally as it is domestically. For example, states are turning to private actors to perform

3. See Pearl Rock Kane & Christopher J. Lauricella, *Assessing the Growth and Potential of Charter Schools*, in *PRIVATIZING EDUCATION* 203 (Henry M. Levin ed., 2001) (discussing rise of privatized education generally and noting that number of charter schools grew from two to nearly 2,500 from 1992 to 2002).

4. See 42 U.S.C. § 604a(a)(1)(A) (2000) (authorizing implementation of welfare programs “through contracts with charitable, religious, or private organizations”); see also Pamela Winston et al., *Privatization of Welfare Services: A Review of the Literature* 3-6 (Mathematica Policy Research Inc., Reference No. 8834-002, 2002), available at <http://aspe.hhs.gov/hsp/privatization02/report/pdf> (discussing increase in private welfare providers).

5. See ALLEN J. BECK & JENNIFER C. KARBERG, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN: PRISON AND JAIL INMATES AT MIDYEAR 2000, at 4 (2001) (reporting that private prison facilities held 76,010 inmates at mid-year 2000).

6. See, e.g., Simon Domberger & Paul Jensen, *Contracting Out by the Public Sector: Theory, Evidence, Prospects*, OXFORD REV. ECON. POL’Y, Winter 1997, at 67, 72-75 (arguing that privatization is efficient in a variety of contexts); F. Howard Nelson & Nancy Van Meter, *What Does Private Management Offer Public Education?*, 11 STAN. L. & POL’Y REV. 271 (2000) (arguing for private management of “public” schools).

7. See, e.g., Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 439 (2005) (arguing that prison privatization undermines core public law values of humanity and parsimony); Gillian Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003) (arguing that privatization can threaten public law values embodied in constitutional norms).

8. See, e.g., U.S. CONST. amend. XIV, § 1 (“No State shall . . .”) (emphasis added).

9. See, e.g., *NCAA v. Tarkanian*, 488 U.S. 179, 191-99 (1988) (holding that the National Collegiate Athletic Association is not a state actor); *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 542-47 (1987) (holding that the U.S. Olympic Committee, a corporation created by federal statute and given control over U.S. participation in the Olympics as well as exclusive oversight of private amateur sports organizations participating in international competition, is not a state actor); *Blum v. Yaretsky*, 457 U.S. 991, 1008-09 (1982) (holding that private nursing homes providing long-term care to Medicaid beneficiaries are not state actors, even though they operate under contract with the government and make need determinations authorized by statute); *Rendell-Baker v. Kohn*, 457 U.S. 830, 837-43 (1982) (holding that private schools are not state actors even though the government contracted with the schools to fulfill its statutory obligation to provide education to special-needs students). *But see* *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 291 (2001) (holding that a private organization overseeing nearly all public and private high school athletic events is a state actor); *West v. Atkins*, 487 U.S. 42, 54-58 (1988) (holding that a private doctor treating prisoners pursuant to a contract with a prison is a state actor).

10. See Dolovich, *supra* note 7, at 446-50 (arguing that private prisons fail to fulfill society’s obligations to inmates); Metzger, *supra* note 7, at 1373-74.

11. See, e.g., Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1300 (2003).

core military, foreign aid, and diplomatic functions. Military privatization entered the popular consciousness in early 2004, when private contractors working as interrogators and translators for the U.S. government abused detainees at Abu Ghraib prison in Iraq.¹² But this kind of military privatization is only the tip of the iceberg. Indeed, though the United States does not yet contract out direct combat functions, we now frequently turn to private actors to provide logistical support to those in combat on the battlefield as well as to aid in strategic planning and tactical advice.¹³ Other states, such as Sierra Leone, have used private contractors to engage in direct combat,¹⁴ and international organizations have weighed the possibility of using private contractors to perform peacekeeping.¹⁵ In the foreign aid context, states and international organizations are increasingly entering into agreements with private non-profit and for-profit entities to deliver all forms of aid, including humanitarian relief, development assistance, and post-conflict reconstruction.¹⁶ Even diplomatic tasks such as peacekeeping negotiations are being undertaken by private actors in conjunction with governments and international organizations.¹⁷

All of this privatization in the international sphere raises the same sort of question for international public law that domestic privatization raises for domestic public law: Will privatization erode fundamental public law values, such as human rights norms, norms against corruption and waste, and democratic process values?¹⁸ After all, international law norms, like many domestic constitutional norms, traditionally apply only to states. The Convention Against Torture, for example, generally prohibits only official

12. See Douglas Jehl & Kate Zernike, *Greater Urgency on Prison Interrogation Led to Use of Untrained Workers*, N.Y. TIMES, May 28, 2004, at A11.

13. See generally P.W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* (2003).

14. See Abraham McLaughlin, *Guns for Hire Thrive in Africa*, CHRISTIAN SCI. MONITOR, Mar. 15, 2004, at 6.

15. See, e.g., SINGER, *supra* note 13, at 182-86.

16. See, e.g., BEYOND U.N. SUBCONTRACTING: TASK-SHARING WITH REGIONAL SECURITY ARRANGEMENTS AND SERVICE-PROVIDING NGOS (Thomas G. Weiss ed., 1998) [hereinafter U.N. SUBCONTRACTING]; Ian Smillie, *At Sea in a Sieve? Trends and Issues in the Relationship Between Northern NGOs and Northern Governments*, in *STAKEHOLDERS: GOVERNMENT-NGO PARTNERSHIPS FOR INTERNATIONAL DEVELOPMENT* 7 (Ian Smillie & Henny Helmich eds., 1999) [hereinafter *STAKEHOLDERS*].

17. See, e.g., James L. Taulbee & Marion V. Creekmore, *NGO Mediation: The Carter Center*, in *MITIGATING CONFLICT: THE ROLE OF NGOS* 156 (Henry F. Carey & Oliver P. Richmond eds., 2003).

18. One can, of course, challenge the idea that certain values can even be labeled “public law values.” Indeed, as both critical legal studies and public choice theory teach, the line between the “public” and “private” is largely incoherent. Yet, that is precisely my point. Instead of seeing privatization solely as a threat to public values, as if there were some meaningful divide between the two, we should focus on the negotiated contractual relationships between the public and the private. As Jody Freeman has noted in discussing domestic privatization, “[t]he view that private actors . . . are menacing outsiders whose influence threatens to derail legitimate ‘public’ pursuits—features prominently in the dominant models of the field. And yet, private actors are also regulatory resources capable of contributing to the efficacy and legitimacy of administration. This realization suggests the possibility of harnessing private capacity to serve public goals.” Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 548-49 (2000). Similarly, I seek to use privatization contracts to pursue what are usually deemed the public ends of international law.

misconduct.¹⁹ Thus, we must ask: as more and more non-state contractors emerge on the international scene, will these individuals and groups necessarily fall through the cracks of international law and evade any public accountability?

My answer to that question is “no,” and in this Article I suggest that the domestic U.S. administrative law literature may provide a useful set of responses to privatization that has been largely overlooked by international law scholars, policy-makers, and activists. In particular, I argue that possibilities for extending public law values inhere in the privatized relationship itself, particularly in the government contracts that are the very engine of privatization. Indeed, the contracts governments enter into with non-state actors can include many provisions that would help to create both standards of behavior, performance benchmarks, and a means of providing some measure of public accountability. While such contractual provisions are not a panacea, they may be at least as effective as the relatively weak enforcement regime of public international law.²⁰ At the same time, by considering international privatization, I seek to open what I believe could be a fruitful dialogue between domestic administrative law scholars and international law scholars about possible responses.

Significantly, while domestic scholars of privatization have not yet turned their attention to foreign affairs privatization, international law scholars have not really focused on privatization at all, and, in any event, have not seriously considered contract as a source of solutions to the potential threat to public law values that privatization may seem to pose. Of course, international law scholars have recognized concerns about how to apply international legal norms to non-state actors in general.²¹ But “non-state actors” is too broad a category because a private contractor is very different from, say, a guerrilla soldier. In particular, because privatization involves an increasing contractual relationship between governments (or international organizations) and private actors, contractual mechanisms for importing public accountability are potentially available with regard to privatization, whereas they obviously are

19. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85, 113-14 (defining torture as certain activities designed to inflict pain or suffering when such “pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”). Of course, this international “state action” requirement can be challenged on a variety of grounds. *See infra* notes 120-124 and accompanying text.

20. Indeed, as I have noted elsewhere, in considering the question of whether privatization undermines international law’s public values, we need to recognize that it is not as if *state* actors are always held accountable for failing to uphold these values. *See* Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability under International Law*, 47 WM. & MARY L. REV. 135 (2005). After all, international law has often been criticized for having relatively weak enforcement mechanisms. *See, e.g.,* Louis Henkin, *Politics of Law-Making*, in INTERNATIONAL LAW: CLASSIC AND CONTEMPORARY READINGS 17, 18-20 (Charlotte Ku & Paul F. Diehl eds., 1998) (noting lack of enforcement in international human rights law). And while this fact may not be cause for celebration, it does serve to remind us that we do not quite lose as much when we privatize in the international sphere as we do when, for example, we privatize domestically.

21. *See, e.g.,* PHILIP ALSTON, NON-STATE ACTORS AND HUMAN RIGHTS (2005); Math Noortman, *Non-State Actors in International Law*, in NON-STATE ACTORS IN INTERNATIONAL RELATIONS 59, 71-72 (Bas Arts et al. eds., 2001).

not relevant to many other instances in which non-state actors play a role in the international sphere.

Moreover, to the extent that international law scholars and policy-makers have proposed any solutions to potential problems created by privatization, these proposals fall far short. At the extreme, some have argued that the best response to military outsourcing, for example, is simply to oppose it altogether, because military functions are somehow “inherently” governmental or because state bureaucracies can be better monitored and held to account in court than private contractors can.²² However, those who simply resist privatization are misguided because the trend toward outsourcing of foreign affairs functions previously performed by state bureaucracies (at least in the recent past) is probably irreversible. The privatization train has not only already left the station, but has gone far down the track. Indeed, even those who seek to send the train back home should favor alternative solutions in the interim, because any return is likely to take a very long time.

Others have argued that private actors with significant impact in the international sphere should be more formally brought within the normative framework of international law. Thus, with each wave of non-state actors—such as guerrilla movements,²³ terrorists,²⁴ non-governmental organizations,²⁵ and corporations²⁶—many international law practitioners and scholars have considered expanding the coverage of public international law to apply to each group. They have therefore contended either that states should (by treaty or customary international law) develop new norms that apply directly to these categories of non-state actors,²⁷ or that any “state action” requirements contained in existing norms (again either in treaties or customary international law) should be interpreted expansively to apply to non-state actors linked to the state.²⁸ At the same time, these scholars and practitioners have tended to focus on the need for courts and tribunals—in many cases new ones—to apply and interpret these norms.

22. John Sifton, Remarks on Private Military Contractors at Conference at Georgetown University Law Center (Apr. 2005).

23. See, e.g., Sylvie Junod, *Additional Protocol II: History and Scope*, 33 AM. U. L. REV. 29, 30-33 (1983).

24. See, e.g., Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 756-57 (2004).

25. See, e.g., Noortman, *supra* note 21, at 72.

26. See, e.g., Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 524-30 (2001) (arguing that more international law norms should be extended to bind corporations directly); see also David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901 (2003) (same). But see Carlos M. Vázquez, *Direct vs. Indirect Obligations of Corporations Under International Law*, 43 COLUM. J. TRANSNAT'L L. 927 (2005) (urging caution).

27. See Junod, *supra* note 23, at 34-38 (discussing guerrillas and insurgents); Noortmann, *supra* note 21, at 71-74 (discussing the “legal personality” of NGOs under international law); Ratner, *supra* note 26, at 524-27 (discussing corporations).

28. See, e.g., Draft Articles on Responsibility of States for Internationally Wrongful Acts, arts. 4, 8, in Int'l Law Comm'n, *Report of the International Law Commission on the Work of Its Fifty-Third Session*, U.N. Doc. A/56/10 (2001) (stating that the “conduct of any State organ shall be considered an act of that State under international law,” and that a person’s conduct shall be attributed to the state if he or she is acting on the state’s instructions or under the state’s direction).

Yet this approach, though it is important because it results in the articulation of norms in the international sphere, can have only a limited effect. Even if the proposed courts and tribunals are established and fully functioning, and even if they expand the norms of international law to apply to the broad range of privatized action, these tribunals will never have the capacity to hold more than a limited number of individuals (and groups) to account. Accordingly, we need to seek alternative mechanisms for extending and implementing public law values to privatized actors in the international sphere. And though literature on corporate responsibility,²⁹ NGOs,³⁰ soft law,³¹ and transnational networks³² has attempted to address some informal modes of accountability, international law scholars have so far not sufficiently discussed the possibility of contract.

This Article begins by laying out the scope of the problem, surveying the extent of foreign affairs privatization, the potential threat it poses to public law values, and the failure of current outsourcing contracts to address this problem. Using Iraq as a case study, I examine the publicly available military contracts as well as contracts to provide foreign aid, and I suggest serious deficiencies in the contracts thus far. Then, drawing on examples and insights from the domestic privatization literature, I set forth nine ways in which contractual provisions could be used to extend and enforce public law values in the foreign affairs privatization context. Specifically, I suggest that contracts be drafted to: explicitly extend relevant norms of public international law to private contractors, delineate training requirements, provide for enhanced monitoring both within the government and by independent third-party monitors, establish clear performance benchmarks, require accreditation, mandate self-evaluation by the contractors, provide for governmental takeovers of failing contracts, include opportunities for public participation in the contract negotiation process, and enhance whistleblower protections and rights of third-party beneficiaries to enforce contractual terms. And, because these public values would be embodied in that quintessential private law instrument—the contract—they would more readily come within the purview of domestic courts or private arbitral bodies and so would rely less on international public law enforcement mechanisms (though those are possible as well). As a result, these contractual provisions may at least make some progress in attempting to ensure that private contractors are accountable both to the publics they serve and to those who are most affected by their work.

29. See David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931, 952-58 (2004); Sean Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 COLUM. J. INT'L L. 389, 424-30 (2005); Ratner, *supra* note 26, at 531-34; Ralph G. Steinhardt, *Corporate Responsibility and the International Law of Human Rights: The Next Lex Mercatoria*, in ALSTON, *supra* note 21, at 177-226.

30. See Leon Gordenker & Thomas G. Weiss, *Pluralizing Global Governance: Analytical Approaches and Dimensions*, in NGOs, THE U.N., AND GLOBAL GOVERNANCE 1, 40-43 (Leon Gordenker & Thomas G. Weiss eds., 1996) [hereinafter GLOBAL GOVERNANCE].

31. See DINAH SHELTON, COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (2003).

32. See ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004).

Of course, one might think that these proposals are unrealistic because one of the main reasons governments privatize is precisely to *avoid* the kind of accountability I propose. Yet governments are not monolithic, and there are undoubtedly many people within bureaucracies, such as contract monitors, who honestly wish to do their job and would therefore welcome (and lobby for) contractual mechanisms that increase accountability. In addition, non-governmental organizations (NGOs) and international organizations can sometimes pressure states to adopt oversight regimes such as the ones I discuss. The problem is that the policymakers and scholars have not sufficiently focused on privatization or the possible accountability mechanisms that could be embodied in contracts. Thus, this Article seeks both to raise awareness about the ways in which contractual provisions might embody public law values and to stimulate a broader-ranging debate about the best way to respond to privatization in the international context.

II. FOREIGN AFFAIRS PRIVATIZATION AND THE THREAT TO PUBLIC LAW VALUES

States and international organizations are increasingly turning to private entities, both for-profit and non-profit, to fulfill a broad range of foreign affairs functions. Just as they are contracting with private organizations to provide domestic services such as welfare, health care, education, and prison management, they are also outsourcing military and intelligence activities, foreign aid, and diplomatic tasks. Yet, until recently, this trend has largely escaped scholarly attention. Moreover, to the extent that scholars have addressed this issue, they have not examined the full scope of privatization across a number of different areas of state activity.³³ This Part briefly maps out the broad-ranging nature of foreign affairs privatization and then discusses the dangers such outsourcing poses to public law values.

33. To date, military/security privatization has generated the most scholarly attention. See generally SINGER, *supra* note 13; Tina Garmon, *Domesticating International Corporate Responsibility: Holding Private Military Firms Accountable Under the Alien Tort Claims Act*, 11 TUL. J. INT'L & COMP. L. 325 (2003); Todd S. Milliard, *Overcoming Post-Colonial Myopia: A Call To Recognize and Regulate Private Military Companies*, 176 MIL. L. REV. 1 (2003); Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879 (2004); Peter Warren Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521 (2004); Juan Carlos Zarate, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, 34 STAN. J. INT'L L. 75 (1998). Other scholars have focused on privatized foreign aid. See Gordenker & Weiss, *supra* note 30, at 1; Smillie, *supra* note 16, at 7. However, not only do these specialized studies necessarily tell only part of the story, they do not systematically explore the possibility of using contractual mechanisms to hold private actors accountable, nor do they draw on the domestic administrative law literature on privatization. At the same time, domestic administrative law scholars have not generally applied their insights to the international context, though there are important exceptions. See generally, e.g., ALFRED C. AMAN, JR., *THE DEMOCRACY DEFICIT, TAMING GLOBALIZATION THROUGH LAW REFORM* 154-55 (2004) (identifying the democracy deficit created by privatization and situating that deficit within a global context); Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism and Democracy*, 46 B.C. L. REV. 989 (2005) (identifying the problems of military privatization).

A. *The Scope of Foreign Affairs Privatization: Military, Foreign Aid, and Diplomatic Functions*

The degree to which states and international organizations have farmed out foreign affairs activities to private actors is truly breathtaking. It would not be an exaggeration to say that the U.S. government has hired private entities to help fight our wars, to deliver much of our foreign aid, and to play an important role mediating our conflicts and engaging in other diplomatic activities. Many other states are pursuing a similar course. International organizations are likewise turning to private entities to support peacekeeping and to deliver all manner of humanitarian, development, and post-conflict reconstruction assistance, as well as to participate in peacemaking negotiations.

The privatization of military functions is perhaps the most remarkable example. Probably no function of government is deemed more quintessentially a “state” function than the military protection of the state itself, and some scholars of privatization in the domestic sphere have assumed that the military is one area where privatization does not, or should not, occur.³⁴ Indeed, some have argued that, by hiring private armies to keep itself secure, the state would threaten its own existence because it would have no way to control these private military actors.³⁵

Yet, governments around the world, including the United States, are increasingly hiring private military companies to perform core military functions.³⁶ For decades, of course, the U.S. government has entered into agreements with private companies to build weapons and other equipment, as well as to provide the basic goods necessary to run a government agency—everything from desks to office supplies.³⁷ However, such contracting activity now covers services to active troops in the field.³⁸ These activities include not only support services, such as food, accommodations, and sanitation for troops on the battlefield, but also core functions such as intelligence gathering, communications, weapons maintenance, and even troop training.³⁹ According to one commentator, “while contractors have long accompanied U.S. armed forces, the wholesale outsourcing of U.S. military services since the 1990s is unprecedented.”⁴⁰

Indeed, if one looks to U.S. forces deployed on the battlefield, the ratio of private contractors to troops has increased dramatically in the past fifteen

34. Cf. Freeman, *supra* note 11, at 1295, 1300.

35. See, e.g., Rosky, *supra* note 33, at 882-83 (stating that a state in which the supply of military force is entirely private is more vulnerable to military revolt than one in which the supply of military force is entirely public and that “the intensity of force justifies the state’s monopoly of the supply of force”).

36. See SINGER, *supra* note 13, at 3-17.

37. See Rebecca Rafferty Vernon, *Battlefield Contractors: Facing the Tough Issues*, 33 PUB. CONT. L.J. 369, 371-72 (2004).

38. *Id.*

39. *Id.* at 416 n.312.

40. SINGER, *supra* note 13, at 16.

years. In the first Gulf War, the ratio was roughly one to one hundred;⁴¹ in the current war in Iraq, the ratio is one to ten.⁴² Although the United States has not yet used the employees of private companies in actual combat roles,⁴³ it has deployed them to fulfill tasks such as military intelligence gathering, troop training, weapons maintenance, and support functions that are very close to combat; these private actors even have the power to wield force in a variety of circumstances.⁴⁴ Other countries, such as Sierra Leone and Angola, have explicitly hired private armies.⁴⁵ In many modern conflicts, these private military companies have played a decisive role.⁴⁶

The pervasiveness of the U.S. military's use of contractors captured media attention with news of their role in Iraq. When stories surfaced that U.S. military personnel had abused detainees at Abu Ghraib prison in Iraq, it soon became clear that private contractors employed by CACI, Inc. and working under an agreement with the Department of the Interior had participated in the abuse.⁴⁷ Indeed, intelligence operatives may actually have given orders to uniformed military.⁴⁸ Translators hired under a similar contract with the firm Titan, Inc. were also implicated in the abuse.⁴⁹ News of gruesome security contractor killings by Iraqi insurgents has sparked additional popular attention.⁵⁰

Yet, CACI is not an anomaly. Firms such as Kellogg, Brown, and Root (KBR) have for years built and maintained military bases, transported troops and equipment to and on the battlefield, repaired and maintained roads and vehicles, distributed water and food to troops, washed laundry, refueled equipment, attended to hazardous materials, and performed related environmental services,⁵¹ earning roughly \$1.7 billion annually from military

41. George Cahlink, *Army of Contractors*, GOV'T EXEC, Feb. 1, 2002, at 43, available at <http://www.govexec.com/features/0202/0202s5.htm>.

42. Singer, *supra* note 33, at 523.

43. Office of Management and Budget Circular A-76, first issued in 1966 and revised as recently as 2003, requires agencies to outsource all functions that are not "inherently-governmental." OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, OMB CIRCULAR A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES 1-3 (2003), available at http://www.whitehouse.gov/omb/circulars/a076/a76_rev2003.pdf. In 1998, Congress gave added force to Circular A-76 by mandating that all agencies must identify government positions that are not "inherently governmental" and contract with the private sector to fill those positions if doing so would be more efficient than filling them with governmental employees. Implementation of the Federal Activities Inventory Reform (FAIR) Act of 1998, 64 Fed. Reg. 33,927 (June 24, 1999). Inherently governmental functions may not be outsourced, however, and such functions include combat positions. See Michael J. Davidson, *Ruck Up: An Introduction to the Legal Issues Associated with Civilian Contractors on the Battlefield*, 29 PUB. CONT. L.J. 233, 256-58 (2000).

44. Vernon, *supra* note 37, at 407-09.

45. See *We're the Good Guys These Days*, ECONOMIST, July 29, 1995, at 32.

46. See Zarate, *supra* note 33, at 94-97.

47. See MAJ. GEN. ANTONIO TAGUBA, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE, 26, 36, 48 (2004) [hereinafter TAGUBA REPORT]; SEYMOUR M. HERSH, CHAIN OF COMMAND 32-34, 61 (2004); Joel Brinkley & James Glanz, *Contractors in Sensitive Roles, Unchecked*, N.Y. TIMES, May 7, 2004, at A15.

48. HERSH, *supra* note 47, at 61.

49. See TAGUBA REPORT, *supra* note 47, at 26, 36, 48; Brinkley & Glanz, *supra* note 47, at A15.

50. James Dao, *Private Guards Take Big Risks, for Right Price*, N.Y. TIMES, Apr. 2, 2004, at A1.

51. See, e.g., Halliburton Company, About KBR, <http://www.halliburton.com/kbr/aboutKBR/>

work.⁵² Beyond this logistical support, other companies provide core military functions such as troop training and intelligence gathering. For example, since 1996, another U.S. company, Military Professional Resources Incorporated (MPRI) has run the ROTC training programs at universities around the country and has played a key role in numerous programs to educate U.S. forces, including officer training, war gaming, and tactical planning.⁵³ In recent years, moreover, MPRI has expanded its services to a wide variety of countries, including Croatia, Bosnia, Angola, Saudi Arabia, Sri Lanka, Nigeria, and Equatorial Guinea,⁵⁴ as well as to regional intergovernmental programs such as the African Crisis Response Initiative.⁵⁵ Finally, and most controversially, military companies have provided direct combat services. For example, the now-dissolved South African company Executive Outcomes, which drew its personnel largely from the apartheid-era South African Defense Force, won contracts with governments in Angola, Sierra Leone, Uganda, Kenya, South Africa, Indonesia, Congo, and others to engage in direct combat during the 1980s and 1990s.⁵⁶ Indeed, its activities in Sierra Leone and Angola are widely believed to have altered the outcome of the conflicts in those states.⁵⁷

Although privatization in the military context has received far more attention, overseas aid is another area in which states are also increasingly turning to private contractors to fulfill functions formerly performed directly by the state.⁵⁸ From emergency humanitarian relief, to long-term development assistance, to post-conflict reconstruction programs, private actors under contract with the United States, other governments, and international organizations are taking a larger and larger role. The most dramatic surge in privatized aid has involved humanitarian relief. The United States, for example, has contracted with private companies such as KBR to build refugee camps,⁵⁹ and with nonprofit NGOs such as Save the Children to deliver relief supplies and medical services.⁶⁰ For fiscal year 2003, the USAID Office of U.S. Foreign Disaster Assistance spent sixty-six percent of its nearly \$300 million budget through NGOs.⁶¹ Other countries and international

index.jsp (last visited Apr. 12, 2005).

52. SINGER, *supra* note 13, at 139.

53. See News Release, Army Reserve 88th Regional Readiness Command, Team MPRI Looking for ROTC Instructors (July 3, 2000), *available at* http://www.usarc.army.mil/88thrc/news/archive/news_rotc_instructors_needed.asp; *see also* MPRI, National Overview, http://www.mpri.com/site/nat_overview.html (last visited Apr. 30, 2005).

54. SINGER, *supra* note 13, at 130-32.

55. *Id.* at 131.

56. See *We're the Good Guys These Days*, *supra* note 45, at 32.

57. See Zarate, *supra* note 33, at 94-97.

58. Ian Smillie, *United States*, in *STAKEHOLDERS*, *supra* note 16, at 253.

59. See SINGER, *supra* note 13, at 144.

60. See USAID, DCHA/PVC-ASHA PORTFOLIO, FISCAL YEAR 2004, at B-5 (2005), *available at* http://www.usaid.gov/our_work/cross-cutting_programs/private_voluntary_cooperation/portfolio05.pdf.

61. USAID OFFICE OF U.S. FOREIGN DISASTER ASSISTANCE, ANNUAL REPORT 14 (2003), *available at* www.usaid.gov/our_work/humanitarian_assistance/disaster_assistance/publications/annual_reports/pdf/AR2003.pdf.

organizations are similarly turning to NGOs to deliver humanitarian aid.⁶² Longer-term development aid has followed a similar trend. By the mid-1980s, development agencies had begun to shift their focus from general funding for foreign governments to more targeted direct support both to grassroots organizations helping to eradicate poverty and to other civil society institutions seen as necessary for democracy and development.⁶³ In the United States, for example, the government now uses both international and foreign NGOs to deliver much of its aid overseas, rather than providing aid directly to foreign governments.⁶⁴ As the cases of Iraq and Afghanistan make clear, privatization is also taking place in the arena of post-conflict reconstruction, with multimillion dollar contracts awarded not only to nonprofit organizations but to for-profit corporations as well.⁶⁵ Indeed, so far in Iraq USAID has awarded fifteen contracts worth a total of \$3.2 billion to for-profit companies, while it has awarded only six grants worth \$40 million to nonprofit organizations.⁶⁶

In addition to military and foreign assistance functions, governments have also turned to private entities to assist in peacemaking and other diplomatic tasks. The Carter Center, probably the best-known organization in this field, has engaged in high-level diplomatic efforts to avoid or end conflicts at the behest of governments around the world.⁶⁷ For example, in 1994, former President Carter assisted the U.S. government in reopening talks with North Korea, negotiating an agreement for the peaceful departure of Raoul Cedras from power in Haiti (thereby averting the need for increased U.S. military intervention), and also brokering a ceasefire in Bosnia.⁶⁸ More recently, the Center has engaged in peacemaking activities at the request of

62. Smillie, *supra* note 16, at 9 (describing foreign aid in France, Sweden, and the EU); *see also* Andrew S. Natsios, *NGOs and the U.N. System in Complex Humanitarian Emergencies: Conflict or Cooperation?*, in GLOBAL GOVERNANCE, *supra* note 30, at 73 (noting the relationships of UNICEF and UNHCR with NGOs); Ruth Wedgwood, *Legal Personality and the Role of Non-Governmental Organizations and Non-State Political Entities in the United Nations System*, in NON-STATE ACTORS AS NEW SUBJECTS OF INTERNATIONAL LAW 21, 23 (Rainer Hofmann ed., 1998) (describing the use of private contractors by UNHCR).

63. *See, e.g.*, Mark Duffield, *NGO Relief in War Zones: Toward an Analysis of the New Aid Paradigm*, in U.N. SUBCONTRACTING, *supra* note 16, at 139, 146 (“By the mid-1980s, a noticeable change in donor funding policy had occurred, from direct donor assistance to recognized governments in favour of international support for private, non-governmental sectors.”).

64. *See* Gordenker & Weiss, *supra* note 30, at 17, 37.

65. *See* USAID, ASSISTANCE FOR IRAQ: ACQUISITION AND ASSISTANCE ACTIVITIES (2005), available at <http://www.usaid.gov/iraq/activities.html> [hereinafter ACQUISITION AND ASSISTANCE].

66. *Id.* Although USAID has awarded a total of sixteen contracts, one of those contracts was awarded to the U.S. Air Force, so I did not include it in the total. *Id.*; *see also* Rony Brauman & Pierre Salignon, *Iraq: In Search of a ‘Humanitarian Crisis’*, in IN THE SHADOW OF ‘JUST WARS’: VIOLENCE, POLITICS AND HUMANITARIAN ACTION 269, 271 (Fabrice Weissman ed., 2004) (noting increased use of for-profit aid providers in Iraq) [hereinafter IN THE SHADOW].

67. *See* Taulbee & Creekmore, *supra* note 17, at 156-71 (discussing the Carter Center, a prominent NGO in these fields).

68. *Id.*

numerous governments, including Uganda, Sudan, and Ecuador.⁶⁹ Other organizations have performed similar roles around the world.⁷⁰

Finally, it is important to note that, in addition to states, international organizations such as the United Nations have also turned to private entities.⁷¹ For example, the office of the United Nations High Commissioner for Refugees (UNHCR) has entered partnerships with hundreds of NGOs around the world for services including refugee protection, community services, field security, child protection, engineering, and telecommunications in emergency relief situations.⁷² Although the United Nations has not deployed private military firms in combat roles,⁷³ some policymakers and commentators have suggested that such a step would provide badly needed help to peacekeeping and peace enforcement operations.⁷⁴ And even those who do not endorse a direct combat role for private firms nonetheless argue that the United Nations should privatize military logistics functions, much as the U.S. government has done.⁷⁵

To be sure, one might argue that privatization in all of these areas of foreign affairs is nothing new. With respect to the military, mercenaries (loosely defined as soldiers working for private gain) have appeared throughout history. From the Swiss guards of the Middle Ages, to the merchant-armies of the British and Dutch East India Companies during the colonial period, to the privateers of early America, to the French Foreign Legion still active today, mercenaries have played a significant role over the centuries.⁷⁶ Indeed, before the Treaty of Westphalia, which marked the emergence of the state system that eventually gave rise to large standing national armies, mercenaries were the norm rather than the exception.⁷⁷ By the twentieth century, however, apart from some post-colonial wars of independence (where mercenaries often fought against national liberation movements), the bulk of military security work has been performed by professionalized, bureaucratized armies and not private actors.⁷⁸ It is against

69. The Carter Center, International Conflict Resolution and Management, <http://cartercenter.org/peaceprograms/program12.htm> (last visited Aug. 16, 2005).

70. For example, the Public International Law and Policy Group has represented numerous countries, including Bosnia, Somalia, and Sudan, in peace negotiations. Public International Law and Policy Group, Peace Negotiations and Post-Conflict Constitutions, <http://www.areas/peacebuilding/negotiations/index.html> (last visited Aug. 16, 2005).

71. See generally U.N. SUBCONTRACTING, *supra* note 16 (analyzing devolution and task sharing by the U.N. and the implications for global governance); see also Natsios, *supra* note 62, at 73 (noting the relationships of UNICEF and UNHCR with NGOs); Wedgwood, *supra* note 62, at 23 (describing the use of private contractors by UNHCR).

72. UNHCR, NGO PARTNERSHIPS IN REFUGEE PROTECTION 16 (2004), available at <http://www.unhcr.org/cgi-bin/texis/vtx/partners/openssl.pdf?tbl=PARTNERS&id=41c162d04>.

73. Thalif Deen, *U.N. Rejects Private Peacekeepers*, INTER-PRESS NEWS, Aug. 27, 2004.

74. See, e.g., U.K. FOREIGN AND COMMONWEALTH OFFICE, PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION, 2001-02, H.C. 577, at 18, available at <http://www.fco.gov.uk/Files/kfile/mercenaries,0.pdf>.

75. Peter H. Gantz, *Refugees International, The Private Sector's Role in Peacekeeping and Peace Enforcement*, GLOBAL POL'Y F., Nov. 18, 2003, <http://www.globalpolicy.org/security/peacekpg/training/1118peacekeeping.htm>.

76. Milliard, *supra* note 33, at 2-3.

77. *Id.*

78. SINGER, *supra* note 13, at 8.

this backdrop that we have seen, over the past two decades, the increasing re-privatization of military functions.

Likewise, the privatization of foreign aid and diplomacy are not wholly recent developments. With respect to foreign aid, private groups from the United States funneled aid overseas for specific causes long before the government developed foreign assistance programs.⁷⁹ Indeed, the practice of *government*-sponsored foreign assistance did not develop in a significant way in the United States until the initiation of the Marshall Plan during the period following World War II.⁸⁰ However, from the 1950s through the 1970s, much of the aid consisted of direct grants to needy countries.⁸¹ In contrast, as noted previously, over the past two decades the government has delivered more and more foreign aid through nongovernmental actors.⁸² And with respect to diplomacy, private organizations have long played a role in ongoing peace negotiations and other efforts, but the high-level diplomatic work of organizations such as the Carter Center is new and distinctive.⁸³

The forces driving this trend toward privatization are not fully understood, but the dominant rationale articulated by most scholars of the subject is the promise of cutting costs.⁸⁴ The government need not offer pensions or benefits to employees of private companies working under contract, and it can hire contractors on a short-term basis, thereby decreasing the size of government bureaucracies. Moreover, unlike many governmental employees, private contractors are typically not unionized. The lack of unionization fuels the political support of those on the right, and, at least in the United States, there tends to be broad bi-partisan support for any trend that seems to make government “smaller” and “more efficient.” In addition, in the case of the military, private military companies may offer governments greater flexibility. Such companies are touted for their ability to work quickly,⁸⁵ and in states with ill-equipped, poorly functioning militaries, private companies can provide badly needed expertise to help train, or even replace,

79. The international non-governmental organization movement has its roots in missionary activities that date back to the sixteenth century. Smillie, *supra* note 16, at 8. Beginning with the founding of the Red Cross in 1860, many secular international NGOs were born out of the conflicts and social movements of the nineteenth and twentieth centuries. *Id.* For example, Save the Children, established in 1920, developed as a response to World War I; Foster Parents Plan emerged after the Spanish Civil War (1936-39); Oxfam and CARE from World War II; World Vision from the Korean War (1950-53); and Médecins Sans Frontières from the conflict in Biafra (1967-70). *See id.* Further growth occurred in the 1960s and the 1970s, stimulated in part by operations such as the Peace Corps, as well as the burgeoning human rights, environmental, and women’s movements. *Id.* at 8.

80. *See generally* Video: The Marshall Plan Study Guide (USAID), <http://www.usaid.gov/multimedia/video/marshall/study.html> (last visited Apr. 12, 2005).

81. *Cf.* Smillie, *supra* note 16, at 249 (discussing the history of private aid organizations, including growth in the 1960s and 1970s).

82. *See supra* notes 58-66 and accompanying text.

83. Taulbee & Creekmore, *supra* note 17, at 156.

84. *See* Barry Yeoman, *Need an Army? Just Pick Up the Phone*, N.Y. TIMES, Apr. 2, 2004, at A19. It should be noted, however, that these cost savings have not been conclusively demonstrated. Indeed, private military companies typically pay their employees more than government employees, and because of the types of contracts they receive, private military companies are particularly susceptible to cost overruns.

85. Samantha M. Shapiro, *Iraq, Outsourced*, N.Y. TIMES MAGAZINE, Dec. 14, 2003, at 79 (quoting Steve Schooner).

government troops.⁸⁶ Using private military companies can also offset shortages of troops by offering a rapid means of growing a state's military capacity, and states can deploy their forces with lower domestic political costs because fewer uniformed troops are put at risk, thus keeping official casualty figures down.⁸⁷ Finally, some have suggested that the growth of private military firms has been fueled in part by the labor pool created as many military dictatorships and their accompanying security forces have been dismantled during transitions to democracy.⁸⁸

Foreign aid privatization also appears to be motivated largely by a desire to cut costs. Certainly in the United States the outsourcing of aid is linked to the political push for smaller government, combined with weak political support for foreign aid generally. Indeed, USAID, perhaps motivated in part by the need to justify its activities to an increasingly skeptical Congress, was one of the first agencies in the United States to take then-Vice President Al Gore's "Reinventing Government" message to heart, declaring in 1994 that "USAID is now fully committed to reinventing itself as a more efficient, effective, and results-oriented organization."⁸⁹

The privatization of diplomatic tasks such as peacemaking has received even less scholarly attention than other forms of foreign affairs privatization, and the reasons behind this trend are thus even less clear. It appears, however, that the growing use of private entities in this arena has stemmed from the high-level experience of those such as former President Carter who have founded and worked for such organizations, as well as the organizations' independence, which frees them from some of the political costs of sensitive diplomatic efforts.⁹⁰

Thus, the recent rise of privatization does represent a shift, at least as compared to the recent past, away from the large, highly-bureaucratized state. Just as states are outsourcing their domestic functions, they are also outsourcing their foreign affairs activities. And while the surge in foreign affairs privatization raises many questions that merit further study,⁹¹ a central issue presented by this trend is whether increased outsourcing undermines the public law values that apply primarily to state actors.

86. See Garmon, *supra* note 33, at 331-34.

87. Yeoman, *supra* note 84, at A19. The promise of placing fewer uniformed troops at risk is, of course, not always fulfilled. For example, after four Blackwater security contractors were killed in Fallujah in March, 2004, and their burned bodies hung from a bridge, the American military launched major assaults on Fallujah in April and November of that year, resulting in some of the highest U.S. military casualty numbers of the war.

88. See *We're the Good Guys These Days*, *supra* note 45, at 32.

89. USAID, *ENHANCING AID'S ABILITY TO MANAGE FOR RESULTS* (1994).

90. See, e.g., Taulbee & Creekmore, *supra* note 17, at 170.

91. It remains unclear whether foreign affairs privatization yields the efficiency gains that are often touted to garner support for the practice. For example, because of the lack of competition in the military contracting process, due in part to security concerns, as well as poor monitoring, it may be that outsourcing actually increases governmental expenditures. See *Waste, Fraud, and Abuse in U.S. Government Contracting in Iraq: Hearing Before the S. Democratic Policy Comm.*, 109th Cong. 10 (2005) [hereinafter *SDPC Hearing*] (statement of Franklin Willis) (arguing that choice of poorly qualified Iraq security contractors, due in part to lack of competition in contractor selection, along with virtually non-existent monitoring has cost taxpayers millions of dollars).

B. *The Threat to Public Law Values*

Just as the protections contained in the U.S. Constitution are generally viewed as prohibitions on state misconduct only,⁹² the principal international human rights and humanitarian law instruments of the twentieth century—the United Nations Declaration on Human Rights,⁹³ the International Covenant on Civil and Political Rights,⁹⁴ the International Covenant on Economic, Social and Cultural Rights,⁹⁵ the Genocide Convention,⁹⁶ the Convention Against Torture,⁹⁷ the Fourth Geneva Conventions,⁹⁸ and the Rome Statute of the International Criminal Court⁹⁹—were drafted primarily with states in mind. As such, at least in the conventional account of public international law, states are seen as both the primary parties to the treaties and the central bearers of rights and responsibilities. These instruments do grant individuals rights, of course—such as the right to be free from torture, cruel, inhuman or degrading treatment, or the right to a fair trial—but these are generally conceived primarily as rights against the state.¹⁰⁰ Conversely, individuals can be held criminally liable, but usually only if some connection to the state is demonstrated. And while there are some exceptions within the overarching framework of public international law—for example, individuals can be convicted for genocide and crimes against humanity (as defined in the recent statute of the International Criminal Court) regardless of any connection to a state apparatus¹⁰¹—state action (or at least a link to it) still remains at the core of most conceptions of international law liability.

The private contractor interrogators and translators implicated in the abuse at Abu Ghraib prison provide a notable example of how these non-state actors might fall through the cracks of this traditional, state-centered approach to public international law. Although the Geneva Conventions and the

92. See *supra* notes 8-9 and accompanying text.

93. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

94. International Covenant on Civil and Political Rights, Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR].

95. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. EXEC. DOC. D, 95-2 (1978), 993 U.N.T.S. 3 [hereinafter ICESCR].

96. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

97. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1456 U.N.T.S. 85 (1984) [hereinafter Torture Convention].

98. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

99. Rome Statute of the International Criminal Court arts. 8(2)(b)(xxii), 8(2)(e)(vi), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter ICC Statute].

100. The Torture Convention, for example, defines as torture only acts that are committed “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” Torture Convention, *supra* note 97, art. 1. The ICCPR likewise defines the rights to a fair trial as rights in proceedings before public “courts and tribunals.” ICCPR, *supra* note 94, art. 14.

101. The Genocide Convention provides explicitly that “[p]ersons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.” Genocide Convention, *supra* note 96, art. 4. The definition of crimes against humanity requires only that the attacks be committed as part of a “State or organizational” policy. ICC Statute, *supra* note 99, art. 7(2)(a).

Convention Against Torture clearly prohibit any abuses committed by US military personnel,¹⁰² the treaties' applicability to non-state actors is ambiguous, and fora for holding non-state actors accountable are limited.¹⁰³ The U.S. government's use of private contractors to transport terrorism suspects to countries known to practice torture¹⁰⁴ has raised similar questions because again, while the Convention Against Torture prohibits governments from taking such actions, its applicability to private actors is ambiguous.¹⁰⁵

Private military companies engaging in direct combat also arguably fall through the cracks of current international law provisions, despite probably being the most notorious for committing atrocities. Although multiple treaties ban the use of certain categories of mercenaries outright, broad gaps in the definition of "mercenary" leave most types of work by private military companies outside the treaties' prohibitions.¹⁰⁶ For example, in Sierra Leone in the 1990s officers of Executive Outcomes, working under contract with the government, reportedly ordered employees carrying out air strikes against rebels to "[k]ill everybody," even though the employees had told their superiors they could not distinguish between civilians and rebels.¹⁰⁷ While such a command would almost certainly constitute a war crime if ordered by a military or civilian authority in the chain of command, it is less clear that such actions committed by private contractors would qualify, at least absent inquiry into the extent of the contractor's link to the government.

Abuses committed by private actors who deliver aid also raise complicated questions about the application of international law. Although aid workers do not by any means regularly mistreat aid beneficiaries, such

102. Under international law, the abuses could be characterized as torture; cruel, inhuman, or degrading treatment; or war crimes. See ICC Statute, *supra* note 99, arts. 1, 16; Fourth Geneva Convention, *supra* note 98, art. 147; Torture Convention, *supra* note 97, art. 8. The acts might also constitute crimes against humanity, if the abuses were "widespread or systematic" and committed "pursuant to . . . a State or organizational policy." ICC Statute, *supra* note 99, art. 7.

103. See Dickinson, *supra* note 20; see also Adam Liptak, *Who Would Try Civilians from U.S.? No One in Iraq*, N.Y. TIMES, May 26, 2004, at A11. To be sure, a civil suit under the Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350 (2000), already has been filed against the contractors implicated at Abu Ghraib for violations of international law. See T. Christian Miller, *Ex-Detainees Sue 2 U.S. Contractors*, L.A. TIMES, June 10, 2004, at A9. Because it has been brought against private parties, the suit will need to demonstrate a link to state action, at least with respect to the claims of torture and other norms that require such a link. In the Abu Ghraib setting, however, such a link may not be so difficult to establish because the private contractors were working in a facility actually run by the U.S. government. Nevertheless, ATCA suits are not likely to be an option in all but a handful of the most egregious cases. See *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (upholding the ATCA as a tool for non-Americans to bring civil suits in U.S. courts, but only for violations of a relatively narrow class of norms).

104. On December 18, 2001, "American operatives participated in what amounted to the kidnapping of two Egyptians . . . who had sought asylum in Sweden." HERSH, *supra* note 47, at 53. Believed to be linked to Islamic militant groups, the Egyptians "were abruptly seized in the late afternoon and flown out of Sweden a few hours later on a U.S. government-leased Gulfstream 5 private jet to Cairo, where they underwent extensive, and brutal, interrogation." *Id.* The company that owns the jet is apparently a corporation registered in Delaware and represented by the Massachusetts law firm Hill & Plakias. Farah Stockman, *Terror Suspects' Torture Claims Have Mass. Link*, BOSTON GLOBE, Nov. 29, 2004, at A1.

105. *Torture Convention*, *supra* note 97, art. 3 ("No State Party shall expel, return . . . or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.") (emphasis added).

106. See Milliard, *supra* note 33, at 19-69 (summarizing treaties).

107. Elizabeth Rubin, *An Army of One's Own*, HARPER'S, Feb. 1997, at 48.

incidents occur more often than one might suspect. For example, employees of Dyncorp Inc., a private corporation that was charged with training police in Bosnia in the 1990s under a contract with the U.S. government, were “implicated in a sex-trafficking scandal” involving acts of rape, sexual abuse, and exploitation.¹⁰⁸ Even staff members of not-for-profit organizations have at times been implicated in abuses. Indeed, a recent study of refugees and internally displaced persons in West African camps in Guinea, Liberia, and Sierra Leone reported widespread rape and sexual exploitation of women and children by many actors, including aid workers.¹⁰⁹ The aid workers and peacekeeping forces allegedly relied on their positions of relative power to use “the very humanitarian aid and services intended to benefit the refugee population as a tool of exploitation.”¹¹⁰ In some camps, it appears that even necessities such as using a toilet were sometimes conditioned on the willingness to perform sexual favors.¹¹¹ Although, as in the military context, such abuses committed by governmental actors generally violate international agreements, the same acts committed by non-state actors fall into a gray area.¹¹²

Even outside the human rights context, the principal regional treaties seeking to deter corruption, for example, apply primarily to misconduct involving governmental actors.¹¹³ Yet, foreign aid contractors have been implicated in fraud and waste. Indeed, Kellogg Brown & Root’s more than \$10 billion in contracts with the U.S. government in Iraq “have been dogged

108. Yeoman, *supra* note 84, at A19. Although Dyncorp offers security services under the contract, I include it and other such contracts within the foreign aid section because they provide assistance to a foreign country, as opposed to assistance to the U.S. military.

109. UNHCR & SAVE THE CHILDREN UK, NOTE FOR IMPLEMENTING AND OPERATIONAL PARTNERS ON SEXUAL VIOLENCE & EXPLOITATION (2002), *available at* <http://www.reliefweb.int/rw/rwb.nsf/AllDocsByUNID/6010f9ed3c651c93c1256b6d00560fca>; *see also* Michel Alger & Francoise Bouchet-Soulinier, *Humanitarian Spaces: Spaces of Exception*, in *IN THE SHADOW*, *supra* note 66, at 297, 302 (describing such abuses in refugee and IDP camps in Guinea, Liberia, and Sierra Leone); Fabrice Weissman, *Sierra Leone: Peace at Any Price*, in *IN THE SHADOW*, *supra* note 66 (describing sexual exploitation by aid workers in IDP camps in Sierra Leone).

110. *See* Scott A. Levin, *Sexual Exploitation of Refugee Children by U.N. Peacekeepers*, 19 N.Y.L. SCH. J. HUM. RTS. 833, 834-35 (2003).

111. *See* Malinda M. Schmiechen, *Parallel Lives, Uneven Justice: An Analysis of Rights, Protection and Redress for Refugee and Internally Displaced Women in Camps*, 22 ST. LOUIS U. PUB. L. REV. 473, 490 (2003).

112. For example, rape or other sexual abuse committed by a public official would in many cases constitute torture under the Convention Against Torture, but similar actions taken by a non-state actor would not, unless undertaken with the “consent or acquiescence” of such an official. Torture Convention, *supra* note 97, art. 1. Rape and related sexual violence are also considered war crimes if committed in either international or internal armed conflict, but only those individuals acting under the authority of the actual parties to the conflict may be held criminally responsible for such acts. ICC Statute, *supra* note 99, arts. 8(2)(b)(xxii), 8(2)(e)(vi). Though non-state actors *can* commit crimes against humanity, such activity would only qualify if it is “widespread or systematic” and conducted pursuant to an organizational plan or policy. *Id.* arts. 7(1)(g), 7(2)(a).

113. For example, states parties to the Organization of Economic Cooperation and Development’s (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions agree to criminalize bribery, but bribery is defined only as payment to public officials to secure a pecuniary or other advantage. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions art. 1, Dec. 18, 1997, 37 I.L.M. 1 [hereinafter OECD Convention]. Payment to a government contractor providing services in order to secure a subcontract, for example, or some other advantage, would not clearly fall within the prohibition.

by charges of preferential treatment, overbilling, cost overruns, and waste.”¹¹⁴ Elsewhere, employees of Custer Battles, a company that was awarded two \$16 million contracts by USAID to provide security for the Baghdad airport and distribute Iraqi dinars,¹¹⁵ reportedly chartered a flight to Beirut with \$10 million in new Iraqi dinars in their luggage—which were promptly confiscated by Lebanese officials.¹¹⁶ The company also set up sham Cayman Islands subsidiaries to submit invoices, and regularly overcharged for materials—in one case charging the United States \$10 million for materials that it purchased for \$3.5 million.¹¹⁷ In short, corruption and fraud have been rampant in the Iraqi contracts. Yet, legal oversight (and democratic accountability) is limited because such contractors operate beyond many of the transparency rules that would apply to government entities.¹¹⁸

Thus, widespread privatization potentially threatens a wide variety of public law values.¹¹⁹ One response to this problem, of course, is to interpret (or amend) the international law norms themselves either to remove any state action requirement, or at any rate to construe such a requirement leniently. Indeed, at least some of the conventional state-centered story of international law that I have recounted has long been subject to challenge. For example, the U.N.’s Draft Articles on Responsibility of States for Internationally Wrongful Acts aims to make clear that the “conduct of any State organ shall be considered an act of that State under international law,” and that a person’s conduct shall be attributed to the state if he or she is acting on the state’s

114. Warren Hoge, *U.N. Criticizes Iraq Occupation Oil Sales*, N.Y. TIMES, Dec. 15, 2004, at A21. In addition, the chief contracting officer for the Army Corps of Engineers has publicly accused the Army of granting preferential treatment to KBR (through its parent company, Halliburton) in awarding contracts in Iraq and Bosnia, in violation of U.S. contracting regulations. Erik Eckholm, *A Top U.S. Contracting Official for the Army Calls for an Inquiry in the Halliburton Case*, N.Y. TIMES, Oct. 25, 2004, at A13.

115. *SDPC Hearing*, *supra* note 91, at 4.

116. *Id.* at 1-2 (statement of Alan Grayson).

117. *Id.* at 2 (statement of Alan Grayson). These allegations resulted in a private enforcement suit under the Federal False Claims Act, 31 U.S.C. § 3730 (2000). See Yochai J. Dreazen, *Attorney Pursues Iraq Contractor Fraud*, WALL ST. J., Apr. 19, 2006, at B1 (discussing the suit). Indeed, in March 2006 a jury ordered Custer Battles to return \$10 million in ill-gotten funds to the government. See *id.* Yet, though the district court judge in that case had permitted the suit to proceed, *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 376 F. Supp. 2d 617 (E.D. Va. 2005), it is unclear whether the verdict will ultimately hold up on appeal and whether such False Claims Act suits will be deemed sustainable in this context.

118. See *infra* text accompanying notes 129-130. As noted in note 117, *supra*, it is unclear whether or not the False Claims Act will ultimately provide an effective avenue for legal accountability.

119. To be sure, as I have argued elsewhere, these gaps may not be as significant as they first appear. See Dickinson, *supra* note 20. To begin with, the baseline of accountability for state actors performing foreign affairs functions is not that great. Such actors are not held accountable for violating the norms that effectuate public law values that often. Thus, the shift to private actors does not represent a dramatic decline in accountability—certainly not as great a decline as in the domestic setting, where state actors are at least sometimes held accountable for failing to uphold public law values. This comparison places the perils of privatization in perspective.

In addition, alternative avenues of legal accountability may exist under private law. As in the domestic privatization context, immunities applicable to governmental employees arguably do not apply, thereby opening up potential private law actions such as tort claims. Thus, in some ways private contractors may face a greater risk of legal liability than governmental actors.

instructions or under the state's direction.¹²⁰ Likewise, courts and tribunals have at times applied principles of state responsibility for instrumentalities to impute the liability of companies onto states.¹²¹ And some courts have suggested that certain international law norms, such as the laws of war, can be used to hold non-state actors directly accountable, at least in some circumstances.¹²² Alternatively, non-state actors can be held liable under theories of complicity or aiding and abetting.¹²³ Thus, it would be wrong to characterize international law as completely impotent with regard to private contractors.¹²⁴

Yet, though I am sympathetic to efforts to revise or interpret the norms of public international law to apply to private contractors, I argue that such efforts should not be the only response to privatization in the international realm. Indeed, public international law norms are imperfectly enforced in the best of circumstances, and any interpretational ambiguities with regard to contractors only compounds the practical difficulties. Thus, those concerned that public values may be lost in a privatized world would be well-advised to look in other directions as well. And, as we will see, the contractual relationship that creates the very structure of privatization may itself offer a means of promoting and enforcing public law values, and it is to such avenues of accountability that we now turn.

III. CONTRACT AS A TOOL TO EXTEND AND ENFORCE PUBLIC LAW VALUES

Contracts between governmental entities and the private organizations providing services can themselves serve as vehicles to promote public law values. Contractual terms can specify norms and structure the contractual relationship in ways that spur contractors to implement those norms. Thus, although typically conceived as the quintessential private law form, contracts used in this way can be a tool to "publicize" the privatization relationship.¹²⁵

120. See *supra* note 28; see also, e.g., Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT'L L. 801 (2002).

121. See *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 351-52 (D.C. Cir. 1995) (holding Iran responsible for corporation over which it exercised control); *Foremost Tehran, Inc. v. Islamic Republic of Iran*, 10 Iran-U.S. Cl. Trib. Rep. 228, 241-42 (1987) (holding the same); *Maffezini v. Kingdom of Spain (Rectification and Award)*, ICSID Case No. ARB/97/7 (Nov. 13, 2000, Jan. 31, 2001) (translation in English) (holding Spain responsible for the acts of its state entity); *Case Concerning Barcelona Traction, Light & Power Co. Ltd. (Belg. v. Spain) (Second Phase)*, 1970 I.C.J. 4, 39, P 58 (Feb. 5) ("[V]eil lifting . . . is admissible to play . . . a role in international law.").

122. See, e.g., *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on the Defense Motion on Jurisdiction, ¶ 61 (Aug. 10, 1995) (noting that war crimes include "crimes committed by any person . . . whether committed by combatants or civilians, including the nationals of neutral states"); *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995) (holding that "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals").

123. See, e.g., Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75 (2005).

124. See generally, e.g., Chia Lehnardt, *Private Military Companies and State Responsibility*, in *MARKET FORCES: REGULATING PRIVATE MILITARY COMPANIES* (Simon Chesterman & Chia Lehnardt eds., forthcoming 2007) (describing ways in which international law holds states accountable for acts of private military companies).

125. See Freeman, *supra* note 11.

Administrative law scholars have recently explored this insight in the domestic context. Most notably, Jody Freeman has suggested that states “could require compliance with both procedural and substantive standards that might otherwise be inapplicable or unenforceable against private providers.”¹²⁶ Yet this work has focused on privatization of healthcare, welfare, and prisons in the United States and has not considered privatization of military, foreign aid, and diplomatic activities. Meanwhile, as noted previously,¹²⁷ few if any international law scholars, policymakers, or NGOs have considered the possibilities of using contractual terms in the international context. Accordingly, this Part seeks to bridge the gap between domestic administrative law and international law scholarship by exploring a variety of contractual mechanisms that might be used to extend public law values to privatized foreign affairs.

Specifically, I discuss nine contracting practices that could be deployed in the foreign affairs arena: (1) incorporating public law standards in contractual terms; (2) requiring that private contractors receive training; (3) enhancing contractual monitoring, both by internal governmental actors and third parties; (4) requiring that contractors receive accreditation from independent organizations; (5) laying out clear performance benchmarks; (6) mandating contractor self-evaluation; (7) enhancing governmental termination provisions and allowing for partial governmental takeover of contracts; (8) allowing for beneficiary participation in contract design; and (9) strengthening enforcement mechanisms, including greater whistleblower protections and more opportunities for third-party beneficiary suits. In considering these possibilities, I will use Iraq as a case study, examining all of the publicly available contracts the U.S. government has negotiated to support the U.S. military or to provide for foreign aid to Iraq. Nevertheless, these same principles would apply to other types of contracts negotiated by states or international organizations with contractors providing a variety of foreign affairs functions.

The contractual mechanisms I discuss are particularly important in the foreign affairs context because many of these contracts are negotiated in secret, without competition, on a “no bid basis,” based on exceptions to the normal requirements of the Federal Acquisition Regulation (FAR).¹²⁸ For example, with respect to the U.S. government’s foreign affairs contracts in Iraq, in many cases it is impossible for the public or a watchdog group even to obtain the text of the contracts, either because government officials have kept them secret for security reasons,¹²⁹ or because the contractors have exercised what is essentially a veto, under the Freedom of Information Act (FOIA), for certain types of commercial information.¹³⁰ Problems posed by secrecy are reinforced by problems of conflict of interest because many of the contracts

126. Freeman, *supra* note 18, at 634.

127. See *supra* text accompanying notes 21-28.

128. See Megan A. Kinsey, Note, *Transparency in Government Procurement: An International Consensus?*, 34 PUB. CONT. L.J. 155, 161-62 (2004).

129. 5 U.S.C. § 552(b)(c)(1) (2000).

130. 5 U.S.C. § 552(b)(c)(4) (2000).

are awarded to firms run by former government personnel. A 2003 study by the Center for Public Integrity reports that sixty percent of the companies that received contracts in Iraq or Afghanistan “had employees or board members who either served in or had close ties to the executive branch for Republican and Democratic administrations, for members of Congress of both parties, or at the highest levels of the military.”¹³¹ Thus, it is essential that, at the very least, the contracts themselves incorporate public values.

A. *Incorporating Public Law Standards in Contractual Terms*

First, of course, the contracts could explicitly require that the contractors obey the norms that implement public law values. Specifically, the terms of each agreement could provide that private contractors must abide by relevant legal rules applicable to governmental actors. Such contractual terms would obviate the need to show that the private actors were functioning as an extension of government so as to satisfy any state action requirement that might arise under domestic and international legal regimes. Instead, the norms applicable to governmental actors would simply be part of the contractual terms, enforceable like any other provisions, regardless of state action.

In the domestic setting, such provisions are commonplace. As a term in their contracts with privately run prisons, for example, many states require compliance with constitutional, federal, state, and private standards for prison operation and inmates’ rights.¹³² In addition, contractual agreements may require contractors to provide for hearings and review of contractor actions.¹³³

The U.S. government’s military and foreign aid contracts in Iraq, by contrast, are woefully inadequate on this score. To be sure, a 2005 Department of Defense (DOD) document providing general instructions regarding contracting practices does state that contractors “shall abide by applicable laws, regulations, DoD policy, and international agreements....”¹³⁴ Yet, of the sixty publicly available Iraq contracts,¹³⁵ none contains specific provisions requiring contractors to obey human rights, anticorruption, or transparency

131. See CENTER FOR PUBLIC INTEGRITY, WINNING CONTRACTORS: U.S. CONTRACTORS REAP THE WINDFALLS OF POST-WAR RECONSTRUCTION (2003), available at <http://www.publicintegrity.org/wow/printer-friendly.aspx?aid=65> [hereinafter WINNING CONTRACTORS].

132. For example, under the model contract for private prison management drafted by the Oklahoma Department of Corrections, contractors must comply with constitutional, federal, state, and private standards, including those established by the American Correctional Association. See Okla. Dep’t of Corr., Correctional Services Contract, art. 1, available at <http://www.doc.state.ok.us/Private%20Prisons/98cnta.pdf> [hereinafter Oklahoma Contract]. Other states’ contracts with companies that manage private prisons contain similar provisions. See, e.g., Fla. Corr. Privatization Comm’n, Correctional Services Contract with Corrections Corp. of America, § 5.1 [hereinafter Florida Contract]; Freeman, *supra* note 18, at 634 (citing Texas Department of Criminal Justice model contract); see also J. Michael Keating, Jr., *Public over Private: Monitoring the Performance of Privately Operated Prisons and Jails*, in PRIVATE PRISONS AND THE PUBLIC INTEREST 130, 138-41 (Douglas C. MacDonald ed., 1990).

133. See Freeman, *supra* note 18, at 608 (discussing contractual hearing and oversight mechanisms in the nursing home context).

134. Dep’t of Defense Instruction, No. 3020.41, § 6.1 (Oct. 3, 2005).

135. See Center for Public Integrity, Contracts and Reports, <http://www.publicintegrity.org/wow/resources.aspx?act=resources> (last visited Aug. 18, 2005) [hereinafter Contracts and Reports] (providing text of contracts).

norms. The agreements between the U.S. government and CACI to supply military interrogators starkly illustrate this point. The intelligence personnel were hired pursuant to a standing “blanket purchase agreement” between the Department of the Interior and CACI, negotiated in 2000.¹³⁶ Under such an agreement the procuring agency need not request specific services at the time the agreement is made but rather may enter task orders as the need arises. In 2003, eleven task orders, worth \$66.2 million were entered (none of which was the result of competitive bidding).¹³⁷ The orders specify only that CACI would provide interrogation support and analysis work for the U.S. Army in Iraq, including “debriefing of personnel, intelligence report writing, and screening/interrogation of detainees at established holding areas.”¹³⁸ Significantly, the orders do not expressly require that the private contractor interrogators comply with international human rights or humanitarian law rules such as those contained in the Torture Convention or the Geneva Conventions. Likewise, although the contractors are subject to international and domestic laws prohibiting the bribery of government officials,¹³⁹ as well as the general terms of the FAR,¹⁴⁰ none of the contracts specifically prohibits the contractors themselves from accepting bribes, an area that remains ambiguous in domestic and international law. Similarly, the contracts do not provide terms specifying the applicability of FOIA, which would help make contractor activities more transparent.

B. *Requiring that Private Contractors Receive Training*

Foreign affairs contracts could also explicitly require that contractors receive training in activities that would promote public law values. Such training, as a contractual requirement, could help instill in contractor employees a sense of the importance of these values. At the same time, training could provide employees with concrete recommendations about how to implement these values in specific, challenging situations.

Again, in the domestic setting such training provisions are commonplace. A standard term in state agreements with companies that manage private prisons, for example, requires companies to certify that the training they provide to personnel is comparable to that offered to state employees.¹⁴¹ Such training would normally include instruction concerning legal limits on the use of force and examples of what those limits mean in circumstances likely to arise in the prison setting.

136. See Agreement Between the Department of the Interior and CACI Premier Technology, Inc., No. NBCHA010005 (2000) [hereinafter DOI-CACI].

137. Work Orders Nos. 000035D004, 000036D004, 000037D004, 000038D0004, 000064D004, 000067D004, 000070D004, 000071D004, 000072D004, 000073D004, & 000080D004, issued under DOI-CACI, *supra* note 136, available at http://www.publicintegrity.org/wow/docs/CACI_ordersAll.pdf.

138. Work Order No. 000071/0001, *supra* note 137.

139. See, e.g., OECD Convention, *supra* note 113; False Claims Act, 31 U.S.C. § 3729 (2000).

140. 48 C.F.R. §§ 2.000 (2006).

141. See, e.g., Oklahoma Contract, *supra* note 132, § 6.4; Florida Contract, *supra* note 132, § 6.5; Freeman, *supra* note 18, at 634 (describing model contract for private prison management drafted by the Texas Department of Criminal Justice).

Yet, while the 2005 DOD instructions require documentation of training concerning appropriate use of force,¹⁴² none of the publicly available Iraq contracts appears to require such training. Indeed, although a few of the agreements require that contractors hire employees with a certain number of years' experience,¹⁴³ none specifies that the contractor must provide any particular training at all. For example, the U.S. government's agreement with Chugach McKinley, Inc. to screen and hire a broad range of military support personnel—from doctors to “special mission advisers”—says nothing about whether such personnel will receive training in applicable international law standards, even though such personnel may be in a position to commit abuses.¹⁴⁴ The U.S. government's agreements with CACI to provide interrogators are likewise completely silent on whether interrogators will receive education in international humanitarian and human rights law, training that U.S. military interrogators would normally receive.¹⁴⁵ Not surprisingly then, an Army Inspector General report on the conditions that led to the Abu Ghraib scandal concluded that 35% of CACI's Iraqi interrogators did not even have any “formal training in military interrogation policies and techniques,” let alone training in international law norms.¹⁴⁶ This omission is particularly glaring given the highly volatile Iraqi environment.

Anti-corruption training would also be useful for foreign affairs contractors generally, and for contracts in Iraq specifically. Iraq ranks among the worst countries in the world on Transparency International's corruption index,¹⁴⁷ and it is no surprise that such corruption reaches U.S. contractors operating there. Indeed, one former Coalition Provisional Authority (CPA) official, Alan Grayson, has asserted that lack of employee screening and training led to the shocking abuses committed by Custer Battles.¹⁴⁸ Yet such contracts say nothing about training for contractors in practices to avoid corruption. And while training requirements undoubtedly would increase the cost of the contracts, the fraud and waste that could be deterred with better training might well offset such increases.

142. Dep't of Defense Instruction, *supra* note 134, § 6.3.5.3.4.

143. *See, e.g.*, Work Order No. 000071/0001, *supra* note 137 (statement of work) (requiring that human intelligence advisor must have at least “10 years of experience” and must be “knowledgeable of Army/Joint Interrogation procedures”). Notably, this work order does not require the contractor to provide any training. *See id.*

144. *See* Agreement between USDOD and Chugach McKinley, Inc., Professional Skills, No. DASW01-03-D-0025 (July 3, 2003), *available at* <http://www.publicintegrity.org/docs/wow/ChugachMcKinley-Iraq.pdf>.

145. *Id.*

146. DEP'T OF THE ARMY, INSPECTOR GEN., DETAINEE OPERATIONS INSPECTION 87-89 (2004), *available at* <http://www4.army.mil/ocpa/reports/ArmyIGDetaineeAbuse/DAIG%20Detainee%20Operations%20Inspection%20Report.pdf>.

147. Out of 145 countries (with 145 as the worst), Iraq ranks 129th. TRANSPARENCY INTERNATIONAL, CORRUPTION PRACTICES INDEX 2004, *available at* http://www.transparency.org/pressreleases_archive/2004/2004.10.20.cpi.en.html.

148. *See supra* text accompanying notes 115–118.

C. *Enhancing Contractual Monitoring, Both by Internal Governmental Actors and by Third Parties*

Provisions could also be made for increased contract monitoring, which could provide an important check on abuses. Such monitoring should include, to begin with, sufficient numbers of trained and experienced governmental contract monitors. At the same time, governmental ombudspersons—leaders of independent offices charged with providing enhanced oversight—serve as an important supplement to the contract monitors. Thus, at a minimum, it is essential that government agencies devote enough resources to ensure that these requirements are implemented in a meaningful way. In addition, outside independent non-governmental organizations, both for-profit and non-profit, can serve an important function by monitoring contracts.

Contracts for services in the domestic context regularly include this three-tiered monitoring structure: government personnel assigned as contract monitors, supplemented by agency actors such as ombudspersons, further supplemented by independent outside groups. In the privatized health care context, for example, where private nursing homes receive Medicaid funding and private hospitals receive Medicare and Medicaid support, the trend is toward agreements that require a state-appointed contract manager.¹⁴⁹ Federal agencies such as the Department of Health and Human Services (whose Inspector General issues reports on contracts with private hospitals that receive public funding¹⁵⁰) and the Health Care Financing Administration (which exerts fairly tight control over private nursing homes receiving Medicaid funding¹⁵¹) also have significant oversight authority. In addition, third-party independent organizations play an important role. For example, the Joint Commission on Health Care and Accreditation of Health Organizations (JCAHO), a private organization of professional associations, certifies health care institutions for compliance with federal regulations and state licensure laws.¹⁵²

Foreign affairs contracts currently provide for far less monitoring. To be sure, the statutory and regulatory scheme includes provisions for governmental contract monitors, supplemented by inspectors general of the respective agencies responsible for the contracts,¹⁵³ as well as for auditing of

149. Freeman, *supra* note 18, at 608-09.

150. See OFFICE OF INSPECTOR GEN., DEP'T OF HEALTH AND HUMAN SERVS., THE EXTERNAL REVIEW OF HOSPITAL QUALITY: A CALL FOR GREATER ACCOUNTABILITY 1-2 (1999), available at <http://oig.hhs.gov/oei/reports/oei-01-97-00050.pdf>; see also OFFICE OF INSPECTOR GEN., DEP'T OF HEALTH AND HUMAN SERVS., THE EXTERNAL REVIEW OF HOSPITAL QUALITY: THE ROLE OF ACCREDITATION 6-7 (1999), available at <http://oig.hhs.gov/oei/reports/oei-01-97-00051.pdf> [hereinafter OFFICE OF INSPECTOR GEN., ACCREDITATION] (detailing lack of accountability and quality oversight in accredited hospitals).

151. See, e.g., U.S. DEPT. OF HEALTH AND HUMAN SERVS., NURSING HOME COMPARE, <http://www.medicare.gov/NHCompare/Home.asp> (last modified Sept. 1, 2005) (database includes information on nursing homes certified by Medicare or Medicaid).

152. See Eleanor D. Kinney, *Private Accreditation as a Substitute for Direct Government Regulation in Public Health Insurance Programs: When Is It Appropriate?*, 57 LAW & CONTEMP. PROBS. 47, 52 (1994).

153. Inspector General oversight arises from the Inspector General (IG) Act, codified as amended at 5 U.S.C. app. 3, §§ 1-12 (1994). "The IG Act authorized the creation of offices whose

contracts by independent private accounting firms.¹⁵⁴ Yet, the work of these monitors focuses primarily on whether the contractors are keeping adequate accounts and refraining from fraud and bribery. Contracts say little about human rights norms, and governmental contract monitors and ombudspersons are not ordinarily focused on these values when scrutinizing contractors.¹⁵⁵ To the extent that independent third-party groups are empowered to monitor under the contract, they tend to be auditing firms, whose expertise lies in financial matters, not in international human rights or humanitarian law. Foreign affairs contracts rarely, if ever, provide for monitoring by independent groups with expertise in this area.¹⁵⁶

Moreover, in practice, foreign affairs contracts tend to escape even this limited oversight. This is because many of the monitoring requirements tend not to apply in emergency situations, which are, of course, precisely the occasions when military intervention or humanitarian relief efforts and post-reconstruction aid are most likely. Thus, ordinary contracting procedures, such as competitive bidding, are often waived.¹⁵⁷ In addition, many of the contracts are written as cost reimbursement contracts, often termed “cost-plus” agreements, under which the government reimburses the contractor for costs incurred in providing a service, plus a fee that is calculated as a percentage of the cost.¹⁵⁸ Though often criticized as leading to waste and abuse,¹⁵⁹ such contracts become the norm in emergency situations, rather than the exception. At the same time, too few contract monitors are appointed, those who are

mission is to detect and prevent fraud, waste, and abuse in their respective departments and agencies across the executive branch.” Michael R. Bromwich, *Running Special Investigations: The Inspector General Model*, 86 GEO. L.J. 2027, 2027 (1998). For an analysis of the role that inspectors general play in various agencies, see *id.*

154. See USAID, OFF. OF INSPECTOR GEN., SEMIANNUAL REPORT 13 (2004), available at <http://www.usaid.gov/oig/public/semiann/sarc0409.pdf>.

155. After a scandal, however, such as the uproar surrounding revelations of abuse at Abu Ghraib prison, ombudspersons may be enlisted to investigate such problems.

156. A model for this type of oversight might be the role that the International Committee on the Red Cross (ICRC) currently plays in monitoring the conduct of governmental actors during armed conflict. The Geneva Conventions require states parties to allow ICRC representatives to visit military detention centers to ensure that detainees are treated in accord with the principles of international human rights and humanitarian law. Geneva Convention Relative to the Treatment of Prisoners of War art. 126, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Fourth Geneva Convention, *supra* note 98, arts. 76, 143. Yet, it is at best ambiguous whether the ICRC would be empowered to play a similar role with respect to private security contractors. The contracts could make this role explicit.

157. In practice, one way these requirements are avoided is through the use of blanket purchase order agreements, in which task orders can be issued under pre-existing contracts. See WINNING CONTRACTORS, *supra* note 131, and accompanying text. For criticism of the lack of open bidding on the Iraq contracts, see CENTER FOR RESPONSIVE POLITICS, REBUILDING IRAQ—THE CONTRACTORS, available at http://www.opensecrets.org/news/rebuilding_iraq/index.asp. For an opposing view, see Jeffrey Marburg-Goodman, *USAID’s Procurement Contracts: Insider’s View*, 39 PROCUREMENT LAW 10 (2003).

158. Federal Acquisition Regulation, 48 C.F.R. §§ 16.301-16.307 (2006).

159. Under the cost-plus system, companies have an incentive to inflate the costs of services so that their fee, typically measured as a percentage of this cost, is as high as possible, see Laura Peterson, *Outsourcing Government: Service Contracting Has Risen Dramatically in the Last Decade*, CTR. FOR PUB. INTEGRITY, Oct. 30, 2003, available at <http://www.publicintegrity.org/wow/report.aspx?aid=68> [hereinafter *Outsourcing Government*], although such contracts do contain a cost ceiling that cannot be exceeded without the contracting officer’s approval. 48 C.F.R. § 16.301-1 (2005). Under the Federal Acquisition Regulations (FAR), these contracts can only be utilized when costs cannot be estimated with sufficient accuracy. *Id.* § 16.301-2.

appointed lack expertise, and ombudspersons are not given the resources they need to do an effective job.

The monitoring of the Iraq contracts, or virtual lack thereof, provides a salient example. The government agencies with responsibility for the contracts—primarily USAID, the DOD, and the now dismantled Coalition Provisional Authority—devoted extraordinarily minimal resources to monitoring.¹⁶⁰ For example, USAID has responsibility for approximately \$3 billion in reconstruction projects,¹⁶¹ but the agency had only four contract monitoring personnel on the ground as of March 2003.¹⁶² In fact, due to the difficulties of monitoring contracts with so little staff, USAID determined to contract out the monitoring function itself!¹⁶³ Likewise, a recent DOD Inspector General study concluded that more than half of the Iraq contracts had not been adequately monitored.¹⁶⁴ This fact is not surprising given that DOD's acquisition workforce was reduced by more than half between 1990 and 2001, while the department's contracting workload increased by more than twelve percent.¹⁶⁵ In addition, those who were assigned to monitor contract performance were often inadequately trained.¹⁶⁶ Finally, in an ironic twist, private contractors themselves are often hired to write the procedural rules governing contracting rules and monitoring protocols, thus leading to further conflict-of-interest problems. Indeed, the DOD handbook on the contracting process was drafted by one of its principal military contractors.¹⁶⁷

The CPA was plagued with similar problems. A recent report notes that the CPA hadn't kept accounts for the hundreds of millions of dollars of cash in its vault, had awarded contracts worth billions of dollars to American firms without tender, and had no idea what was happening to the money from the Development Fund for Iraq (DFI) which was being spent by the interim Iraqi government ministries.¹⁶⁸

One former CPA official has observed that, as a result of poor oversight, "contracts were made that were mistakes, and were poorly, if at all, supervised [and] money was spent that could have been saved, if we simply had the right numbers of people."¹⁶⁹ For example, even devoting a single staff person to the

160. For a searing indictment of the government's failure to oversee military contractors and that failure's role in the Abu Ghraib atrocities, see Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STAN. L. & POL'Y REV. 549 (2005).

161. See ACQUISITION AND ASSISTANCE, *supra* note 65.

162. See Shane Harris, *AID Plans To Contract Out Oversight of Iraq Contracts*, GOVEXEC.COM, May 20, 2003, <http://www.govexec.com/dailyfed/0503/052003h1.htm>.

163. See *id.*

164. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF DEFENSE, ACQUISITIONS: CONTRACTS AWARDED FOR THE COALITION PROVISIONAL AUTHORITY BY THE DEFENSE CONTRACTING COMMAND-WASHINGTON, REP. NO. D-2004-057, at 24 (2004).

165. COMPTROLLER GEN., U.S. GEN. ACCOUNTING OFFICE, SOURCING AND ACQUISITION, REP. NO. GAO-03-771R, at 1 (2003); see also *Outsourcing Government*, *supra* note 159. For a detailed discussion of the depletion of the acquisition workforce, see David A. Whiteford, *Negotiated Procurements: Squandering the Benefit of the Bargain*, 32 PUB. CONT. L.J. 509, 555-57 (2003).

166. *Id.*

167. See SINGER, *supra* note 13, at 123-24.

168. Ed Harriman, *Where Has All the Money Gone?*, LONDON REV. OF BOOKS, July 7, 2005, at 4, 5.

169. SDPC Hearing, *supra* note 91, at 4.

two \$16 million Custer Battles contracts that gave rise to multiple instances of fraud and abuse¹⁷⁰ would have saved at least \$4 million.¹⁷¹

Finally, the dispersal of authority to issue foreign affairs contracts across multiple agencies creates interagency communication problems and conflicts of interest that impede oversight.¹⁷² For example, officials at different agencies use different methods to calculate the costs of contracts, and these methods may also vary from those used by the companies themselves.¹⁷³ In addition, because agencies can earn fees for facilitating other agencies' contracts but are not adequately held to account for monitoring those contracts, agencies have incentives to sponsor other agencies' contracts but little incentive to supervise them.¹⁷⁴ These arrangements can lead to abuse, as occurred in the case of the Department of the Interior sponsorship of DOD's task orders for intelligence services at Abu Ghraib prison under an existing contract between CACI and the Interior Department.¹⁷⁵

In short, the foreign affairs contracts could provide far better protections for public law values through greater monitoring. Although the statutory and regulatory regime contemplates a combination of supervision by contract monitors, independent agency oversight through inspectors general, and limited financial auditing by third-party entities, these provisions have not worked well in practice due to insufficient staffing and resources, combined with the large number of contracts. To be sure, statutory and regulatory reforms could address these problems. But, alternatively, the contracts themselves could remedy these deficiencies to some extent, by specifying greater numbers of monitors and requiring that they possess a certain degree of training, as well as by allowing for independent oversight by third-party groups such as the International Committee of the Red Cross (ICRC).

D. *Laying Out Clear Performance Benchmarks*

Of course, to some degree increased contract monitoring can only be effective to the extent that the contracts have clear benchmarks against which to measure compliance. In the domestic context, commentators and policymakers have long urged that contracts include benchmarks, and rigorous performance standards regularly appear in contracts.¹⁷⁶ Scholars have argued that, ideally, performance-based contracts should "clearly spell out the desired

170. See *supra* text accompanying notes 115-117.

171. See generally *SDPC Hearing*, *supra* note 91, at 24 (statement of Franklin Willis). Of course, the lack of oversight may have a more cynical explanation: it permits private contractors (who may have powerful connections within government) to reap profits without significant constraints.

172. The DOD has taken more and more control over reconstruction and emergency relief functions, normally the province of USAID. See *Contracts and Reports*, *supra* note 135. The State Department, meanwhile, manages the contract with DynCorp to provide Iraqi police training. *Id.* And the State Department's Bureau of Population, Refugees, and Migration (PRM) manages refugee assistance funds.

173. WINNING CONTRACTORS, *supra* note 131.

174. Schooner, *supra* note 160, at 564-70.

175. *Id.*

176. See, e.g., HARRY P. HATRY, URBAN INST., *PERFORMANCE MEASUREMENT: GETTING RESULTS* 3-10 (1999).

end result” but leave the choice of method to the contractor, who should have “as much freedom as possible in figuring out how to best meet government’s performance objective.”¹⁷⁷

These ideas have been implemented most notably in contracts with private prisons. For example, under the model contract for private prison management drafted by the Oklahoma Department of Corrections, contractors must meet such delineated standards for security, meals, and education.¹⁷⁸ They must also certify that the training provided to personnel is comparable to that offered to state employees.¹⁷⁹ In Texas, contractors must abide by similar terms and, in addition, must “establish performance measures for rehabilitative programs.”¹⁸⁰ In addition, the American Correctional Association is revising its accreditation standards to include performance measures, and the Office of Juvenile Justice and Delinquency Prevention is developing performance-based standards for juvenile correctional facilities.¹⁸¹ Commentators have noted, further, that performance measures for private prison operators could include both

process measures such as the number of educational or vocational programs, or outcome measures such as the Logan quality of confinement index, the number of assaults, or the recidivism rate. . . . Because no single statistic adequately captures ‘quality,’ and because focusing on any single measure could have perverse effects, performance-based contracts should tie compensation to a large and rich set of variables.¹⁸²

Privatized welfare programs have also experimented with performance measures as a means to improve quality. In 1996, Congress authorized the implementation of welfare programs “through contracts with charitable, religious, or private organizations.”¹⁸³ Since then, states have increasingly contracted with such organizations,¹⁸⁴ and many of these contracts contain performance benchmarks and output requirements.¹⁸⁵ For example, under a performance-based system, a welfare contractor might receive financial

177. WILLIAM D. EGGERS, PERFORMANCE-BASED CONTRACTING: DESIGNING STATE-OF-THE-ART CONTRACT ADMINISTRATION AND MONITORING SYSTEMS 2 (1997).

178. See, e.g., Oklahoma Contract, *supra* note 132, § 5.

179. *Id.* §§ 6.3-6.4.

180. See Freeman, *supra* note 18, at 634-35 (describing contract between private corporation and state of Texas).

181. See Performance Standards Home: Performance-Based Standards for Juvenile Correction and Detention Facilities, <http://www.pbstandards.org>; see also 1 Geoffrey F. Segal & Adrian T. Moore, *Weighing the Watchmen: Evaluating the Costs and Benefits of Outsourcing Correctional Services* 15-16 (Policy Study 290, 2002).

182. *A Tale of Two Systems: Cost, Quality, and Accountability in Private Prisons*, 115 HARV. L. REV. 1868, 1889-90 (2002) [hereinafter *Tale of Two Systems*].

183. 42 U.S.C. § 604a(a)(1)(A) (2000).

184. See Winston, *supra* note 4.

185. See M. BRYNA SANGER, THE WELFARE MARKETPLACE: PRIVATIZATION AND WELFARE REFORM 28-48 (2003) (discussing issues raised by performance contracting for welfare services); Sheena McConnell et al., *Privatization in Practice: Case Studies of Contracting for TANF Case Management* 39-51 (Mathematica Policy Research, Inc., Reference No. 8834-008, 2003), available at <http://www.mathematica-mpr.com/PDFs/privatize.pdf> (discussing use of performance measures in welfare contracts).

rewards for increasing the percentage of program participants who receive job placements.¹⁸⁶

The foreign affairs contracts are notably less rigorous in providing for performance measures. Although military service contracts are difficult to evaluate because so many of them are not publicly available, contract officers familiar with the contracts have remarked on their generally vague terms.¹⁸⁷ And the fact that they are often indefinite delivery/indefinite quantity (ID/IQ) contracts adds to their open-ended quality.¹⁸⁸ Under this structure, the government awards a contract that does not specify how many services or goods will be necessary or the dates upon which they will be required.¹⁸⁹ These additional details are specified in subsequent task orders, which themselves are often vague because the task orders need not pass through the same degree of supervision as the initial contract award.¹⁹⁰ Of course, such contracts may sometimes be necessary, because the government cannot know in advance precisely what will be required or for how long.¹⁹¹ Yet the lack of any administrable standards in these contracts can lead to significant abuses.¹⁹²

Of the publicly available Iraq contracts for military services, it is striking that none contains clear benchmarks or output requirements. Instead, they are phrased in amorphous language that provides little opportunity for compliance evaluation. For example, a contract between the U.S. government and MPRI to provide translators for government personnel, including interrogators, simply provides that the contractors will supply interpreters.¹⁹³ The agreement says nothing about whether the interpreters must be effective or how effectiveness might be measured.¹⁹⁴ Similarly, the CACI task orders for interrogators specify only that CACI will provide interrogation support and analysis work for the U.S. Army in Iraq, including “debriefing of personnel, intelligence report writing, and screening/interrogation of detainees at established holding areas.”¹⁹⁵ Other than these broad goals, the task orders say little more. To be sure, security concerns may require some degree of vagueness. Nonetheless, the task orders could be much more specific about training requirements, standards of conduct, supervision, and performance parameters.

Turning to the foreign aid context, agencies tend to promote the use of results-based agreements, under which contractors must demonstrate specific,

186. See Metzger, *supra* note 7, at 1387-88.

187. See, e.g., *SDPC Hearing*, *supra* note 91, at 3-4 (prepared statement of Franklin Willis).

188. For example, the CACI agreement was an ID/IQ contract. Cf. Schooner, *supra* note 160, at 569 (using the “Abu Ghraib experience” as an illustration of the dangers of ID/IQ contracts).

189. ID/IQ contracts are governed by 48 C.F.R. § 16.500-6 (2005). For a discussion of ID/IQ contracts, see Karen DaPonte Thornton, *Fine-Tuning Acquisition Reform’s Favorite Procurement Vehicle, the Indefinite Delivery Contract*, 31 PUB. CONT. L.J. 383 (2002).

190. See 48 C.F.R. § 16.504 (2005); see also Schooner, *supra* note 160, at 565.

191. See Thornton, *supra* note 189, at 387.

192. See, e.g., Schooner, *supra* note 160, at 563.

193. Agreement Between DOD and MPRI, Iraq Interpreters, No. GS-23F-9814H (Apr. 28, 2003), available at http://www.publicintegrity.org/docs/wow/MPRI_Linguists.pdf.

194. *Id.*

195. Work Order No. 000071D004, *supra* note 137, at 6.

tangible results that are to be evaluated by the agency.¹⁹⁶ Yet in practice many such agreements do not actually contain any results-based requirements, often because the aid, particularly in emergency relief settings, is provided on an expedited basis to organizations with very small staffs. With regard to Iraq, for example, a review of the publicly available USAID agreements reveals that only a few set forth specific performance benchmarks or requirements.¹⁹⁷

To be sure, performance benchmarks that are too strict can pose problems. As scholars of domestic privatization have noted, discretion can serve useful goals; indeed, discretion is in part what makes privatization desirable, as private contractors have more flexibility than rulebound bureaucratic actors to pursue innovative approaches.¹⁹⁸ Output requirements that preserve flexibility about the means to achieve those results are therefore the most effective.¹⁹⁹ But even carefully tailored output requirements can go awry, as when, for example, private welfare providers “cream” those accepted into their programs in order to increase the percentage of those who receive job placements.²⁰⁰ Moreover, output requirements can sometimes give contractors tunnel vision, leading them to focus only on the benchmarks, thereby missing opportunities to achieve wider benefits. A recent study of the enhanced “auditing” that accompanied privatization in Thatcherite Britain, for example, suggests that narrow output requirements steered organizations and individuals away from broader, more diffuse, social goals.²⁰¹

196. See, e.g., Judith Tendler, *Turning Private Voluntary Organizations into Development Agencies: Questions for Evaluation* (127.49 AIG Program Evaluation Discussion Paper No. 12, 1982) (making recommendations regarding USAID’s evaluation process for contracted projects).

197. See Agreement Between USAID and Bechtel National, Inc., Iraq Infrastructure Reconstruction—Phase II, No. SPU-C-00-04-00001-00 (Jan. 4, 2004), available at <http://www.usaid.gov/iraq/contracts/iirii.html>; Agreement Between USAID and Bearing Point Inc., Economic Recovery, Reform, and Sustained Growth, No. RAN-C-00-03-00043-00 (July 25, 2003), available at <http://www.usaid.gov/iraq/contracts/errsgi.html>; Agreement Between USAID and Skylink Air and Logistic Support (USA), Inc., Airport Administration, No. DFD-C-00-03-00026-00 (May 5, 2003), available at <http://www.usaid.gov/iraq/contracts/aa.html>; Agreement Between USAID and Abt Associates, Inc., Public Health, No. RAN-C-00-03-0001-00 (Apr. 30, 2003), available at <http://www.usaid.gov/iraq/contracts/ph.html>; Agreement Between USAID and Bechtel, Inc., Capital Construction, No. EEE-C-00-03-00018-00 (Apr. 17, 2003), available at <http://www.usaid.gov/iraq/contracts/cc.html>; Agreement Between USAID and Creative Associates International, Inc., Primary and Secondary Education, No. EDG-C-00-03-00011-00 (Apr. 11, 2003), available at <http://www.usaid.gov/iraq/contracts/pse.html>; Agreement Between USAID and Research Triangle Institute, Local Governance, No. EDG-C-00-03-00010-00 (Apr. 11, 2003), available at <http://www.usaid.gov/iraq/contracts/lg.html>.

198. See, e.g., Nestor Davidson, *Relational Contracts in the Privatization of Social Welfare: The Case of Housing*, 24 YALE L. & POL’Y REV. (forthcoming 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=887398 (arguing for a “relational” approach to contracting that “shifts the locus of efficiency and accountability efforts from contractual specificity and enforcement to encouraging flexibility and fostering mutual responsibility for program goals”); Metzger, *supra* note 7, at 1388 (“[T]he operational flexibility of private providers can make them better able to improve staff performance and tailor their programs to meet the needs of particular participants of employers.”); Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1262 (2003) (“Rigid standards could force private providers to behave like government and lose their potential for innovation, efficiency, and flexibility.”).

199. See EGGERS, *supra* note 177, at 2.

200. See Sanger, *supra* note 185, at 21-22, 42-43, 68-69, 104-06.

201. See generally MICHAEL POWER, *THE AUDIT SOCIETY: RITUALS OF VERIFICATION* (1999).

In addition, by their very nature, results-based contracts raise difficult questions about how best to measure output. Creating benchmarks may be relatively straight-forward if the project at issue involves simply building a bridge or dam, but it is very difficult to measure intangibles, such as fostering human development or building civil society.²⁰² Likewise, short-term results, such as whether food aid was delivered, are much easier to measure than longer-term systemic efforts to alleviate poverty, provide education, and so on. As a consequence, results-based contracts tend to put more emphasis on short-term delivery of services rather than longer-term impact.²⁰³ Finally, contractual output requirements do not, of course, necessarily ensure compliance because contractors may simply fail to meet their goals. In addition, even the most detailed performance requirements and standards inevitably leave considerable discretion to the contractor.²⁰⁴

Nonetheless, despite problems with overly rigid performance benchmarks, the foreign affairs contracts (at least those that are publicly available) appear to fall at the opposite end of the spectrum. Indeed, they possess so few benchmarks and output requirements that they contain no meaningful evaluative criteria whatsoever. In such circumstances, enhanced performance benchmarks could be a useful contractual tool.

E. *Requiring that Contractors Receive Accreditation from Independent Organizations*

Another contract-based tool for promoting public law values is accreditation. Independent organizations, often consisting of experts or professionals in the field, can evaluate and rate private contractors. These ratings can then be used in the contracting process because agreements can require that contractors receive certain rankings. Or, governmental entities or international institutions, such as the United Nations, could develop accreditation regimes.

Again, the domestic context offers a particularly rich set of examples that could provide useful lessons in the foreign affairs setting. For example, in the field of publicly funded, privately provided health care, JCAHO accredits hospitals receiving Medicare and Medicaid funding. Indeed, such accreditation is required by statute as well as by contract.²⁰⁵ State laws or contractual terms also often specify that health maintenance organizations must receive accreditation by the National Committee for Quality Assurance (NCQA), an independent non-profit organization, before receiving public funding.²⁰⁶ Until recently, NCQA certification was primarily voluntary,

202. See Smillie, *supra* note 16, at 10.

203. *Id.* at 10-11.

204. See, e.g., *supra* note 198 and accompanying text (discussing important benefits of discretion).

205. See Kinney, *supra* note 152, at 52.

206. Although NCQA's accreditation program is voluntary, almost half the HMOs in the nation, covering three quarters of all HMO enrollees, are currently involved in the NCQA Accreditation process. Significantly, employers increasingly require or request NCQA accreditation of the plans with

offering health maintenance organizations an advantage when competing for lucrative health care delivery contracts. When states became managed care purchasers, however, they adopted NCQA as a benchmark of quality.²⁰⁷

Similarly, many contracts with private prison operators require companies to receive accreditation by the American Correctional Association (ACA).²⁰⁸ An organization of correctional professionals that has existed for over a century, the ACA accredits prisons and provides training for prison personnel while also setting standards that apply to virtually every aspect of prison operation.²⁰⁹ Not only has ACA accreditation become a standard contract requirement,²¹⁰ but federal courts have used ACA standards to interpret constitutional and statutory provisions.²¹¹ Even private investors look to accreditation as an indication of quality.²¹² Thus, the accreditation requirement creates significant compliance incentives.

Privatized education regimes such as charter schools have also considered accreditation by independent organizations as a means of ensuring quality.²¹³ The focus of many independent organizations on facilities and administrative processes over underlying educational quality has led some critics to charge that educational accreditation is relatively ineffective.²¹⁴ Nonetheless, commentators have advocated improved accreditation procedures and greater use of such accreditation to promote public law values.²¹⁵

Indeed, domestic administrative law scholars have noted that these independent, private accrediting entities are effectively setting the standards that give meaning to public law values.²¹⁶ In that regard, the relative insularity

which they do business. See National Comm. for Quality Assurance, NCQA: Overview, <http://www.ncqa.org/Communications/Publications/overviewncqa.pdf> (last visited Mar. 30, 2006).

207. Freeman, *supra* note 18, at 618-19; see also J. Robert Lilly & Paul Knepper, *The Corrections-Commercial Complex*, 39 CRIME & DELINQ. 150, 156-57 (1993).

208. See, e.g., Oklahoma Contract, *supra* note 132; Freeman, *supra* note 18, at 634 (describing model contract for private prison management drafted by the Texas Department of Criminal Justice that contains such a requirement).

209. See Freeman, *supra* note 18, at 628-29. Freeman notes that, "throughout its history, the ACA has fostered professionalism in prison administration through the development of standards and promoted progressive reforms such as rehabilitation." *Id.*

210. See, e.g., Florida Contract, *supra* note 132, § 5.21 (requiring prison to maintain accreditation); Oklahoma Contract, *supra* note 132, § 5.2.

211. See MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 162-64 (1998).

212. Freeman, *supra* note 18, at 629.

213. See Isabel V. Sawhill & Shannon L. Smith, *Vouchers for Elementary and Secondary Education*, in VOUCHERS AND THE PROVISION OF PUBLIC SERVICES 263 (C. Eugene Steuerle et. al. eds., 2000).

214. See *Accreditation: What Does It Mean?*, PARENT POWER!, Dec. 2000, at 2-3, available at http://www.edreform.com/_upload/00dec.pdf#ppArt75.

215. Stephen D. Sugarman & Emlei M. Kuboyama, *Approving Charter Schools: The Gate-Keeper Function*, 53 ADMIN. L. REV. 869, 937 (2001).

216. As Freeman observes, in the prison context, "the ACA, rather than government agencies, may effectively establish correctional standards." Freeman, *supra* note 18, at 629. Other private organizations—such as the American Medical Association, the National Sheriffs' Association, the American Public Health Association, and the National Fire Protection Association, all of which have published guidelines or standards governing "such things as medical care, sanitation, and safety in prisons"—play a similar role. *Id.* In the health care context, the Joint Commission on Healthcare and Accreditation also develops industry standards, through "a committee that includes representatives of

of the standard-setting and accreditation process may undermine the ability of broader groups, including consumers and the public at large, to participate in the process.²¹⁷ There is also the concern that private accreditors in some cases might be too close to the contractors, and therefore too lenient.²¹⁸ Nevertheless, even critics agree that the standards are often much better than those that would be developed by agency bureaucrats, and despite the imperfections, accreditation has served as an important check on the contracting process.²¹⁹

In contrast, accreditation is glaringly absent in the foreign affairs context.²²⁰ Human rights organizations, governments, and the United Nations have begun to encourage corporations, particularly those in the extraction industries, to comply with voluntary labor, environmental, and human rights standards.²²¹ A consortium of NGOs that deliver humanitarian relief have initiated the SPHERE project, which is an effort to set standards for the provision of humanitarian aid, including specific guidelines for field operations, training, and self evaluation.²²² And an industry-founded association of private security companies, the International Peace Officers Association (IPOA), has begun to construct a comprehensive code of conduct that includes human rights standards.²²³ Nevertheless, neither the U.N., nor domestic governments, nor outside groups concerned with potential abuses by foreign affairs contractors have so far undertaken serious efforts either to harness these nascent accreditation initiatives or to promote other accreditation projects.

This failure is particularly striking in the Iraq context. Not one of the available contracts for aid or military services requires that the entities

professional and industry groups, as well as government representatives from” the Health Care Financing Administration. *Id.* at 610-12.

217. *Id.* at 612-13; *see also* Kinney, *supra* note 152, at 65.

218. Because ACA officials are generally chosen from the ranks of experienced corrections officials, for example, “personal and professional relationships between ACA overseers and prison management are not uncommon, creating a common sympathy and sense of purpose that tells against both more meaningful standards and more rigorous enforcement.” Dolovich, *supra* note 7, at 492. Moreover, Dolovich argues that because the institutions pay for accreditation, thereby “providing income on which the ACA is dependent for its survival . . . a degree of capture is likely.” *Id.* (citation omitted).

219. *Id.* at 490-491 (acknowledging benefits of ACA accreditation of prisons); Kinney, *supra* note 152, at 65 (acknowledging benefits of JCAHO accreditation of hospitals).

220. To be sure, the Federal Acquisition Regulation does require the evaluation of all contracts in excess of \$1,000,000, 48 C.F.R. § 42.1502 (2006), and also requires contract officers to take into account the past performance of contractors in all competitively negotiated acquisitions expected to exceed \$1,000,000. 48 C.F.R. § 15.304(c)(3) (2006). Thus, in theory, an internal “blacklist” of rogue contractors could be created to guard against repeat abuses. But such an internal system hardly substitutes for independent accreditation.

221. *See, e.g.*, U.N. Global Compact, <http://www.unglobalcompact.org/abouttheGC/index.html> (May 17, 2005) (program, launched by U.N. Secretary-General Kofi Annan, to encourage corporations to agree voluntarily to respect nine principles, including the protection of human rights and the environment); David Stout, *Oil and Mining Leaders Agree To Protect Rights in Remote Areas*, N.Y. TIMES, Dec. 21, 2000, at A9 (describing agreement among oil and mining companies, the British and U.S. governments, and human rights organizations, providing that companies will voluntarily comply with human rights standards).

222. *See* THE SPHERE PROJECT, HUMANITARIAN CHARTER AND MINIMUM STANDARDS IN DISASTER RESPONSE (2004), *available at* http://www.sphereproject.org/handbook/hdbkpdf/hdbk_hc.pdf [hereinafter SPHERE CHARTER].

223. *See* IPOA Code of Conduct, <http://www.ipoaonline.org/conduct/> (Mar. 31, 2005).

receiving the contracts be vetted or accredited by independent organizations. For example, unlike domestic prison contracts, which routinely require accreditation by ACA and compliance with a comprehensive set of standards, the contracts with CACI to provide interrogators at Abu Ghraib contain only the most basic guidelines and make no mention of human rights compliance or accreditation requirements.²²⁴ The contract between the U.S. government and Dyncorp to provide law enforcement advisers to train Iraqi police similarly contains no provision mandating that Dyncorp be accredited,²²⁵ even though Dyncorp employees were implicated in sex abuse when performing under a similar contract in Bosnia.²²⁶ Likewise, although contracts could require that humanitarian aid organizations agree to the SPHERE guidelines in order to receive contracts, no such requirement has been imposed.²²⁷

Yet, such accreditation would seem to be particularly important in the foreign affairs area, where, as discussed previously, security concerns and special considerations often eliminate competition in the contracting process, resulting in contracts that are structured without the usual market controls. Significantly, the problem is not only that international organizations and domestic governments neglect to require accreditation in their contracts, but also that NGOs and other independent groups have not sought a robust accreditation role. After all, more NGOs could, like the SPHERE Project's efforts in humanitarian aid, begin to rate military contractors independently, regardless of whether the government contracts require such accreditation. These ratings might then become an industry standard that the government could be persuaded to use as a contracting factor. This is what occurred with NCQA in the domestic health care context. And, even if agency officials negotiating contracts choose not to impose accreditation requirements, the ratings could serve as a point of pressure in Congress and the public at large. Thus, NGOs should spend at least as much energy developing accreditation regimes as they do pursuing transnational litigation under various formal international law instruments. International organizations could also seek to create accreditation regimes. Such accreditation would likely be influential over time, even if states at first formally refuse to implement accreditation requirements into their contracts.

F. *Mandating Contractor Self-Evaluation*

Contractors could also be required to perform self-evaluations as a way of enhancing accountability. Presented with an internal self-evaluation, an outside monitor, whether governmental or third-party, can often scrutinize the

224. See Work Orders, *supra* note 137.

225. See Agreement Between U.S. Dep't of State and Dyncorp, Iraq Law Enforcement, No. SLMAQM-03-C-0028 (Apr. 18, 2003), available at <http://www.publicintegrity.org/docs/wow/DynCorp.pdf>.

226. See Yeoman, *supra* note 84, at A19.

227. See SPHERE CHARTER, *supra* note 222. Although SPHERE itself is a project of the not-for-profit sector, see <http://www.sphereproject.org> (listing representatives of not-for-profits and governments as board members), nothing prevents contracting agencies from requiring for-profit entities as well to follow SPHERE guidelines in fulfilling contracts.

contractor's performance more quickly and efficiently. Of course, self-evaluation gives the contractor discretion to massage the data and indeed can be subject to outright manipulation and abuse.²²⁸ But nonetheless, it can be a useful starting point for outside monitors, who can at least at the outset make a faster assessment as to whether the contractor has met the contract goals. In addition, self-evaluation can encourage more effective internal policing by the contractor.

Due to these potential benefits, self-evaluation has emerged as a frequent tool in the domestic context. In the world of private prisons, for example, contractors regularly are subjected to self-evaluation requirements. In Texas, prison contractors must "establish performance measures for rehabilitative programs and develop a system to assess achievement and outcomes."²²⁹ Likewise in the field of health care, a health maintenance organization must, if it is to receive accreditation, conduct continuous "quality improvement," in an ongoing internal self-evaluation process.²³⁰ Contracts that require accreditation thus effectively mandate such self-evaluation.

In the foreign affairs context, private foreign aid providers operating under agreement with USAID are regularly required to perform self-evaluation, but foreign aid contracts provided through other agencies and military contracts seem to be devoid of such provisions. Again, taking the publicly available Iraq contracts as an example, none requires the private contractor to file self-evaluation reports, develop internal assessment practices, or otherwise engage in self-evaluation.²³¹ And while self-evaluation on its own is unlikely to significantly improve contract compliance, such self-evaluation can be useful in combination with some or all of the other contractual provisions discussed in this Article.

G. *Enhancing Governmental Termination Provisions and Allowing for Partial Governmental Takeover of Contracts*

Contracts could also include terms allowing the relevant government (or international organization) to take over the contract by degrees before ultimately terminating the agreement for failure to observe provisions implementing public law values. Currently, most contracts have implied or explicit provisions allowing only for outright termination for noncompliance. On its face this sort of termination provision seems as if it would provide a strong incentive for contractor compliance. In actual practice, however, outright termination is such an extreme measure that governments are often reluctant to invoke it, and because contractors know that termination is so unlikely, the provisions have almost no disciplining effect.

228. *See id.*

229. *See* Freeman, *supra* note 18, at 634-35 (describing contract between private corporation and the Texas Dep't of Criminal Justice).

230. *See, e.g.,* NCQA, What Does NCQA Review When It Accredits an HMO?, <http://www.ncqa.org/Programs/Accreditation/mco/mcostdsoverview.htm> (last visited Mar. 29, 2006).

231. *See* Contracts and Reports, *supra* note 135.

Thus, it would be better if such termination provisions were supplemented with more graduated penalties, such as provisions permitting the partial governmental takeover of contracts. Because graduated penalties are less extreme than outright termination, they are far more likely actually to be invoked by contract monitors, making them a more effective enforcement mechanism than the harsher (though rarely invoked) termination provisions. Moreover, if partial takeover fails to stem the abuses, outright termination still remains a penalty of last resort. In the domestic context, states are increasingly turning to mechanisms such as graduated penalties, for example, to increase oversight of private nursing homes receiving public funding.²³² Scholars and practitioners have also called for the use of such penalties in the private prison setting.²³³

Turning to foreign affairs, while contracts subject to the FAR do contain termination provisions, they are rarely exercised and are not supplemented by lesser, graduated penalties. As a result, the government has little leverage over contractors. The Iraq contracts provide a notable demonstration of this problem. When CACI employees were implicated in abuses at Abu Ghraib prison, for example, the U.S. government did not terminate its contract. Indeed, although the particular employees implicated in the abuse charges no longer work at CACI,²³⁴ it is unclear whether government actors even so much as stepped up their supervision of the contracts. To the contrary, CACI actually received a contract *extension* for interrogation services.²³⁵

Obviously, governments (and international organizations) should be encouraged to invoke termination provisions when contractors fall short. But even without full termination of the contractors, graduated government (or international organization) takeover could provide an added incentive for contractors to promote public law values.

H. *Allowing for Beneficiary Participation or Broader Public Involvement in Contract Design*

Contracts could also permit beneficiaries or the broader public to help shape contract terms and evaluate performance. In the domestic context, commentators have suggested that such beneficiary participation or involvement by the broader public could greatly enhance the extent to which contractors fulfill public law values.²³⁶ Indeed, as Fred Aman has argued, precisely because privatization contracts are difficult to terminate and

232. Freeman, *supra* note 18, at 608.

233. *Tale of Two Systems*, *supra* note 182, at 1888; see also Alphonse Gerhardstein, *Private Prison Litigation: The "Youngstown" Case and Theories of Liability*, 36 CRIM. L. BULL. 183, 198 (2000).

234. See CACI, CACI in Iraq: Frequently Asked Questions, http://www.caci.com/iraq_faqs.shtml (last visited May 21, 2005) [hereinafter CACI in Iraq]; News Release, CACI, CACI Says the Fay Report Clearly Shifts Focus of Blame Away From Its Employee Named in a Previous Report (Aug. 26, 2004), available at http://www.caci.com/about/news/news2004/08_26_04_NR.html.

235. See CACI in Iraq, *supra* note 234.

236. Jody Freeman, for example, has suggested that, in order to protect public law values, "perhaps interested individuals, or representative groups should be entitled to participate in contract negotiation." Freeman, *supra* note 18, at 668.

sometimes become “immutable,” it is “important that the participation of the public and the public’s representatives be maximized as early in the process as possible.”²³⁷ He thus advocates allowing the broader public to play a role in the design of the contracts themselves.²³⁸

Some state and local governments have begun to do so. For example, Wisconsin’s contracts with managed care organizations to provide health care to Medicare and Medicaid recipients include provisions for participation by community groups.²³⁹ Other states have gone even further and now require broad public involvement in virtually all privatization decisions. In Montana, for example, any privatization decision must be made subject to a plan available to the public and open to public comment.²⁴⁰ Other states have similar provisions.²⁴¹

Foreign affairs contracts might benefit from this approach. Indeed, such participation may be particularly important to promote public law values because the ordinary democratic process open to those experiencing the effects of privatization in the domestic context is essentially unavailable for non-citizens outside the United States who are affected by the activities of contractors. To be sure, even in the domestic context, there has long been a worry that privatization removes a crucial democratic check on government. The link between those affected by government action and the government actors is attenuated when that activity is farmed out first from legislatures to agencies, and then from agencies to private contractors. Scholars and policy-makers worry that this form of delegation reduces transparency, which in turn reduces the ability of those affected to vote their preferences when things are not going well.²⁴² But when governments turn to private contractors to perform foreign affairs functions, the problem is increased exponentially because many of the people affected by the contracts in question do not belong to the U.S. democratic polity or indeed any democratic polity at all. Moreover, U.S. citizens may be less inclined to use the democratic process to voice their views when the effects of contracting are felt mainly overseas.

While it may make less sense to allow involvement of those non-citizens affected by military contractors overseas, due to obvious security concerns, beneficiary involvement or broader public participation in the design and evaluation of foreign aid contracts might be particularly useful. Governments providing long-term development aid through private organizations have to some degree already begun to adopt this approach. In the United States,

237. AMAN, *supra* note 33, at 155.

238. *See id.* at 155-56 (critiquing a number of state privatization statutes for failing to provide adequate provisions for public participation in the design of contracts).

239. *See* Freeman, *supra* note 18, at 624-25.

240. MONT. CODE ANN. § 2-8-302 (2005).

241. For a discussion of such provisions, see AMAN, *supra* note 33, at 154-56.

242. *See, e.g.,* Jonathan Turley, *The Military Pocket Republic*, 97 NW. U. L. REV. 1, 72 (2002) (“This layer of agencies creates obvious problems for theories of democracy that emphasize the ability of citizens to influence their government through participatory action or deliberative process.”). *But see* Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1542 (1992) (arguing that agencies, because they fall between the extremes of a “politically over-responsive Congress and the over-insulated courts,” may be best situated to institute a civic republican model of policymaking).

USAID has allowed local beneficiaries and NGOs to help design development aid agreements, usually on an informal basis, and most frequently when such agreements are negotiated through field offices.²⁴³ Agencies other than USAID, however, are less likely to engage in such consultation.²⁴⁴ Humanitarian aid and post-conflict reconstruction assistance are also less likely to incorporate such an approach, though recently the UNHCR has begun to explore the possibility of refugee and internally displaced person evaluation of humanitarian aid.²⁴⁵

I must leave to a future article a more detailed discussion of how best to maximize opportunities for those affected by a foreign aid project to participate in the design of that project.²⁴⁶ Certainly, the idea raises a whole host of practical problems. For example, it will be difficult to determine who exactly can speak for an affected population. Is NGO participation sufficient? How does one determine which civil society actors are most representative? What if different sectors of the population disagree as to the efficacy of a proposed project? Even assuming one determines the appropriate voices, what form should the feedback take? Is informal consultation enough? Or should there be a more formal notice and comment period? Or is it necessary to establish an independent tribunal with the power to quash the project altogether? And should such a tribunal be governmental or private? While these questions certainly must be addressed, it seems to me that if we are asking them, we will have already advanced the debate quite a bit. The important point for now is that we must at the very least begin to explore ways of involving in the contracting process itself those affected by foreign affairs agreements. Explicit contractual requirements would go a long way toward facilitating consultation with beneficiary populations, thereby effectuating through contract a broader form of public participation.

I. *Strengthening Enforcement Mechanisms*

Finally, the contracts could provide for enhanced enforcement mechanisms. They could, for example, give beneficiaries the opportunity for privatized administrative hearings. Additionally, contracts might include third-party beneficiary suit provisions, empowering contract beneficiaries or other interested parties to sue in domestic courts for breach of contract. And whistleblower protections might be enhanced. All of these measures would likely increase compliance with contractual terms.

In the domestic context, governments and policymakers have begun to implement such measures, though private grievance procedures remain more prevalent than broader third-party beneficiary suit provisions and

243. See generally Tania Kaiser, *Participation or Consultation? Reflections on a 'Beneficiary Based' Evaluation of UNHCR's Programme for Sierra Leonean and Liberian Refugees in Guinea, June-July 2000*, 17 J. REFUGEE STUD. 185, 186 (2004) (discussing ways to facilitate measuring the impact of aid programs).

244. See *id.*

245. See *id.*

246. See Laura Dickinson, *Privatization and Public Participation in Foreign Affairs* (2006) (unpublished manuscript, on file with the author).

whistleblower protections. Commentators regularly call for an expansion of third-party beneficiary suit provisions²⁴⁷ (which courts generally refuse to imply unless clearly specified in the contract),²⁴⁸ but such provisions remain rare. Many private contractors providing aid, however, do offer individual complaint mechanisms for affected beneficiaries.²⁴⁹ Although these aid providers are not state actors and would therefore generally be immune from constitutional review, such contractual provisions do allow for notice and opportunity to be heard, thereby incorporating elements of constitutional due process. These private grievance systems are perhaps most evident in contracts with private prison operators, which typically require such mechanisms.²⁵⁰ But they appear in other contexts as well, such as health care. For example, the Medicare statute requires that health maintenance organizations receiving federal funding to cover their treatment of Medicare beneficiaries must “provide meaningful procedures for hearing and resolving grievances between the organization . . . and members enrolled.”²⁵¹

Governments might experiment with similar measures in the foreign affairs arena.²⁵² The World Bank has taken steps in this direction, by enabling aid beneficiaries to bring grievances before special tribunals challenging gross abuses.²⁵³ Third-party beneficiary suit provisions, however, are virtually nonexistent, and none of the Iraq contracts contains such a provision. Whistleblower protections should also be enhanced. Government officials currently receive whistleblower protection for reporting abuses in the negotiation or management of contracts, but employees of private companies are not protected under the general Whistleblower Protection Act.²⁵⁴ In specific statutes, however, Congress has at times extended whistleblower protection to private employees. For example, seven of the major federal

247. See, e.g., Freeman, *supra* note 11, at 1317.

248. For example, section 313(2) of the Restatement (Second) of Contracts provides “[A] promisor who contracts with a government or governmental agency to do an act for or render a service to the public is not subject to contractual liability to a member of the public for consequential damages resulting from performance or failure to perform unless (a) the terms of the promise provide for such liability; or (b) the promisee is subject to liability to the member of the public for the damages and a direct action against the promisor is consistent with the terms of the contract and with the policy of the law authorizing the contract and prescribing remedies for its breach.” RESTATEMENT (SECOND) OF CONTRACTS § 313(2) (1981). For further discussion of third-party beneficiary suits involving government contracts, see Melvin Aron Eisenberg, *Third-Party Beneficiaries*, 92 COLUM. L. REV. 1358, 1406-12 (1992).

249. See Metzger, *supra* note 7, at 1494.

250. For examples of contracts with private operators that require grievance procedures, see Florida Contract, *supra* note 132, § 5.24; Oklahoma Contract, *supra* note 132, § 5.15; Freeman, *supra* note 18 (describing Texas Contract).

251. 42 U.S.C. § 1395mm(c)(5)(A) (2000).

252. Such experiments might focus, at least initially, on those contracts deemed most vulnerable to serious abuses.

253. See Lori Udall, *The World Bank and Public Accountability: Has Anything Changed?*, in THE STRUGGLE FOR ACCOUNTABILITY: THE WORLD BANK, NGOS, AND GRASSROOTS MOVEMENTS 391, 392-93 (Jonathan A. Fox & L. David Brown eds., 1998).

254. 5 U.S.C. § 2302 (1989). While it is true that such employees could bring a *qui tam* action for fraud, 31 U.S.C. § 3730(b)(1), (c), (d), (h) (2000), such a suit would do nothing to protect the employee from being fired.

environmental statutes contain such whistleblower clauses.²⁵⁵ Thus, whistleblower protection could also be extended to private sector employees working for a government contractor, who provide information concerning the unlawful performance of a contract. Such a provision, combined with the availability of third-party beneficiary suits, or possibly even *qui tam* actions,²⁵⁶ would go a long way towards making sure that any contract-based efforts to provide accountability will have back-end enforcement to encourage compliance.

As discussed previously, enforcing international law norms through contract, rather than directly in an international forum, obviates any need to argue that the contractor should be deemed a state actor. In addition, because international law enforcement mechanisms are relatively weak compared to their domestic counterparts, a contractual approach is far more likely to lead to meaningful judicial review. In addition, requiring domestic judges to enforce international public law values embodied in contracts may have important norm internalization effects because such judges would essentially be enforcing international law norms.²⁵⁷ This increased familiarity with international law principles might lead to less resistance to those norms as a general matter, thereby effectively expanding the reach of international law.

On the other hand, one might argue that localizing the enforcement of international law norms might either cause international enforcement mechanisms to atrophy from disuse or lead to heterogeneity in different countries' understandings of the principles, which could undermine the notion of a common international law. Neither objection, however, should create serious hesitation about pursuing contractual accountability. First, as previously discussed, international law enforcement mechanisms are already weak, and to the extent that they have been effective, at least in the human rights context, it has been by selectively limiting the scope of enforcement to the very most egregious human rights violators. Thus, it is not at all clear that providing a possibly effective domestic avenue for pursuing claims against private actors (who would have been unlikely to face prosecution internationally in any event) will in any meaningful way undermine international law institutions. Second, to the extent that domestic judicial systems, government officials, and broader populations internalize international law norms, it strikes me that the benefits of such norm internalization far outweigh any possible concern about maintaining the "purity" of the international norm. Local variation is to be expected, of course,

255. See Toxic Substance Control Act § 23, 15 U.S.C. § 2622 (2000); Federal Water Pollution Control Act Amendments of 1972 § 2, 33 U.S.C. § 1367 (2000); Clean Air Act Amendments of 1977 § 312, 42 U.S.C. § 7622 (2000); Comprehensive Environmental Response, Compensation & Liability Act of 1980 § 110, 42 U.S.C. § 9610 (2000); Safe Drinking Water Act § 2, 42 U.S.C. § 300j-9(i) (2000); Resource Conservation and Recovery Act of 1976 § 2, 42 U.S.C. § 6971 (2000); Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (2000) (amended 1978, 1992).

256. See *supra* note 117 (describing such an action against Custer Battles, LLC, an Iraq contractor).

257. See, e.g., Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996) (arguing that international law is often enforced through the domestic internalization of international law norms).

but such heterogeneity in the domestic incorporation of international norms strikes me as a strength, not a weakness. Finally, the key point is that without focusing on contracts, there may be no realistic way to impose norms of accountability on privatized foreign affairs activity at all. Accordingly, those seeking to expand the applicability of international law norms should at the very least seriously consider using contractual enforcement mechanisms or risk the possibility that such norms will simply be ignored in an increasingly privatized world.

IV. CONCLUSION

Resisting privatization in the foreign affairs context is probably no longer an option. Indeed, if anything the scope and pace of privatization in the international arena is increasing. Moreover, it will not be sufficient merely to tweak existing international law treaties or doctrines (or even invent new ones) in order to bring private contractors within the ambit of formal international law. After all, even if international or domestic courts could be convinced that private contractors should be held liable for violation of international law norms (which is far from certain), international and transnational public law litigation will never be able to hold accountable more than a handful of people. Accordingly, those who seek to preserve or expand the values embodied in public international law will also need to look elsewhere to find mechanisms for ensuring accountability in a privatized world.

In this Article, I have suggested one such mechanism: the government contract that creates the privatized relationship in the first place. Drawing on the far more extensive domestic administrative law literature on the subject, I have identified a variety of provisions that could be incorporated into such contracts. These provisions seek to encourage compliance with (and enforcement of) human rights and humanitarian law, ensure transparency and democratic accountability, and promote norms against corruption, waste, and fraud. Taken together, they provide a menu of options for regulators, activists, policymakers, and scholars who are concerned at the potential for abuse in our current contracting processes.

Of course, governments may be hesitant to insist on some of these contractual provisions. For example, officials may fear that such requirements could unduly increase the costs of privatization both to the contractor and to the government entity overseeing the contract.²⁵⁸ Or, more cynically, resistance might stem from the fact that governments actually benefit from a more opaque process with less public oversight. In any event, one seeming difficulty with relying on contractual provisions is that the increased oversight

258. See, e.g., Jack M. Sabatino, *Privatization and Punitives: Should Government Contractors Share the Sovereign's Immunities from Exemplary Damages?*, 58 OHIO ST. L.J. 175, 191 (1997) (expressing concern that litigation and administrative costs could "siphon away public resources that could have been devoted to, among other things, the effective implementation and oversight of the contractors' work").

will be included in contracts only as a “matter of legislative or executive grace,” and therefore can be rescinded or limited at any time.²⁵⁹

Yet, such objections do not render a contractual approach unrealistic. To begin with, concerns about the cost of additional contractual requirements may well be over-stated. As the Custer Battles fiasco makes clear, in many cases better oversight could actually save the government far more money than it costs. And as to concerns that added contractual provisions will cause contractors to walk away or prohibitively raise their rates, the short answer is that far more empirical work must be done to assess whether such dire predictions are accurate. After all, it seems quite unlikely that contractors bidding for these extraordinarily lucrative contracts with governments such as the United States will pull out of the process just because of some added contract requirements. To the contrary, the government should, by all rights, have tremendous leverage in the contracting process because there are unlikely to be competing customers similarly able to offer billions of dollars in contract awards. Indeed, while government contractors in the past have often raised concerns about increased compliance costs to object to enhanced contractual oversight,²⁶⁰ at least one commentator has challenged such claims, noting the absence of compelling evidence that increased oversight through, for example, *qui tam* suits has resulted in a significant number of firms refusing to do business with the government.²⁶¹

In addition, while some governmental officials surely would prefer a more opaque process, governments are not monolithic entities, and proposals such as the ones outlined in this Article may be taken up and championed by members of the bureaucracy, even without the imprimatur of higher level executive branch officials or the legislature. Moreover, it is incorrect to think that more robust contractual monitoring can only come about through official executive branch or legislative action. First of all, some of the proposals for monitoring of contracts and accreditation or rating of contractors could be undertaken by NGOs or other groups without any official action whatsoever. While such evaluations might not initially have the power of the state behind them, the example of NCQA indicates that, over time, governments can be convinced to adopt a previously unofficial rating system as its own. Second, even if governments never adopted the standards, simply the process of evaluating and accrediting contractors would provide a rich source of public information about privatization that could be used to bring popular political (or economic) pressure to bear on noncompliant contractors. Such public reporting might also allow citizen watchdog groups (or even competing contractors) to monitor the effectiveness of particular contracts, publicize

259. See Metzger, *supra* note 7, at 1404-05.

260. See, e.g., William E. Kovacic, *The Civil False Claims Act as a Deterrent to Participation in Government Procurement Markets*, 6 SUP. CT. ECON. REV. 201, 205 (1998) (reporting contractors' concerns that the specter of *qui tam* suits is “a costly, substantial burden of doing business with the government”).

261. See Stephen L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U. L. REV. 627, 668 n.137 (2001).

deficiencies, and lobby government officials for change.²⁶² Third, advocacy at the international level could result in treaties or other international regimes that actually require governments to include oversight provisions in certain categories of contracts, thus creating increasing pressure for change. In any event, as the domestic examples demonstrate, governments and agencies can, at least at times, be mobilized to require meaningful contractual oversight.

In the end, whatever the drawbacks of a contractual approach, they are certainly no greater than the weaknesses of the existing formal transnational/international court system. Indeed, the use of contractual provisions has the benefit of opening up the possibility of legal enforcement regardless of whether or not there is state action and to provide the foundation for legal action in domestic, as well as international, fora. Such contractual mechanisms might also pave the way for statutes and treaties. Thus, international law scholars, activists, and advocates should spend at least as much time studying and lobbying for contract-based compliance regimes as they do seeking further openings for international or transnational litigation.

Perhaps most importantly, we must remember that the proper management of privatization will almost certainly require a variety of approaches, and we need not choose one to the exclusion of others. My aim here is simply to focus attention on privatization in the international realm as a crucial field of study, to call for dialogue among international and domestic scholars, advocates, and policy-makers concerning appropriate responses, and to suggest that more attention be paid to the possibility of using contractual provisions to provide accountability. None of these aims requires that contract become the only response to privatization.²⁶³ To the contrary, in the coming years we will need to think broadly and creatively about how best to respond to the threats posed by the outsourcing of governmental functions to non-governmental entities. Only through such efforts will we be able to find ways

262. Indeed, as Bradley Karkkainen has pointed out, the Toxics Release Inventory (TRI), 42 U.S.C. § 11023 (2000), which requires that industrial facilities report the release and transfer of specific chemicals, has had a significant impact on pollution emissions. See Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257, 287-88 (2001). According to Karkkainen, the TRI, because it creates a performance metric, “both compels and enables facilities and firms to monitor their own environmental performance” and “encourages them to compare, rank, and track performance among production processes, facilities, operating units, and peer or competitor firms.” *Id.* at 261. In addition, Karkkainen argues that the TRI data “subjects the environmental performance of facilities and firms to an unprecedented degree of scrutiny by their peers, competitors, investors, employees, consumers, community residents, environmental organizations, activists, elected officials, regulators, and the public in general.” *Id.* at 261-62. As a result, this transparency scheme “unleashes, strengthens, and exploits multiple pressures, all tending to push in the direction of continuous improvement as facilities and firms endeavor to leapfrog over their peers to receive credit for larger improvements or superior performance.” *Id.* at 262. In addition, administrators—whether within companies or in government bureaucracies monitoring contract compliance—have a management incentive to improve transparency. *Id.* at 295-305. Thus, although information by itself does not provide accountability, see *id.* at 338-43 (noting that some small firms may be unconcerned about the mere release of information), it can enable other accountability mechanisms.

263. Indeed, I see contract as one of an array of accountability mechanisms—including the formation of a treaty regime, litigation, statutory reform, political accountability, and internal organizational sanctions—each of which merits further exploration and study.

to protect crucial public law values in the era of privatization that is already upon us.

Article

Public Law Values in a Privatized World

Laura A. Dickinson†

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I. INTRODUCTION

Domestic law scholars and policymakers have long debated issues surrounding privatization.¹ Over the past twenty years, the U.S. government has increasingly contracted with private organizations to perform a variety of functions—from health care,² to education,³ to welfare,⁴ to prison

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1. A recent symposium issue of the *Harvard Law Review* even goes so far as to declare that we are in “an era of privatization.” See Symposium, *Public Values in an Era of Privatization*, 116 HARV. L. REV. 1211 (2003).

2. See generally THE PRIVATIZATION OF HEALTH CARE REFORM: LEGAL AND REGULATORY PERSPECTIVES (M. Gregg Bloche ed., 2003).

management.⁵ While advocates of privatization have generally argued for the practice on efficiency grounds,⁶ critics have worried that, even if privatization may cut financial costs, it can threaten important public law values.⁷ Because many constitutional norms protect individuals only from government misconduct,⁸ and because courts have been largely unwilling to view such norms as applicable to private contractors,⁹ these critics have argued that privatization will dramatically reduce the scope of public law protections in the United States.¹⁰ Others have sought a middle ground, arguing that privatization offers a means to extend public law values through the government contracts themselves, in a process of “publicization.”¹¹

To date, however, none of these scholars has squarely confronted the growing phenomenon of privatization in the international realm or its impact on the values embodied in public international law. Yet, with both nation-states and international organizations increasingly privatizing foreign affairs functions, privatization is now as significant a phenomenon internationally as it is domestically. For example, states are turning to private actors to perform

3. See Pearl Rock Kane & Christopher J. Lauricella, *Assessing the Growth and Potential of Charter Schools*, in *PRIVATIZING EDUCATION* 203 (Henry M. Levin ed., 2001) (discussing rise of privatized education generally and noting that number of charter schools grew from two to nearly 2,500 from 1992 to 2002).

4. See 42 U.S.C. § 604a(a)(1)(A) (2000) (authorizing implementation of welfare programs “through contracts with charitable, religious, or private organizations”); see also Pamela Winston et al., *Privatization of Welfare Services: A Review of the Literature* 3-6 (Mathematica Policy Research Inc., Reference No. 8834-002, 2002), available at <http://aspe.hhs.gov/hsp/privatization02/report/pdf> (discussing increase in private welfare providers).

5. See ALLEN J. BECK & JENNIFER C. KARBERG, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN: PRISON AND JAIL INMATES AT MIDYEAR 2000, at 4 (2001) (reporting that private prison facilities held 76,010 inmates at mid-year 2000).

6. See, e.g., Simon Domberger & Paul Jensen, *Contracting Out by the Public Sector: Theory, Evidence, Prospects*, OXFORD REV. ECON. POL’Y, Winter 1997, at 67, 72-75 (arguing that privatization is efficient in a variety of contexts); F. Howard Nelson & Nancy Van Meter, *What Does Private Management Offer Public Education?*, 11 STAN. L. & POL’Y REV. 271 (2000) (arguing for private management of “public” schools).

7. See, e.g., Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 439 (2005) (arguing that prison privatization undermines core public law values of humanity and parsimony); Gillian Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003) (arguing that privatization can threaten public law values embodied in constitutional norms).

8. See, e.g., U.S. CONST. amend. XIV, § 1 (“No State shall . . .”) (emphasis added).

9. See, e.g., *NCAA v. Tarkanian*, 488 U.S. 179, 191-99 (1988) (holding that the National Collegiate Athletic Association is not a state actor); *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 542-47 (1987) (holding that the U.S. Olympic Committee, a corporation created by federal statute and given control over U.S. participation in the Olympics as well as exclusive oversight of private amateur sports organizations participating in international competition, is not a state actor); *Blum v. Yaretsky*, 457 U.S. 991, 1008-09 (1982) (holding that private nursing homes providing long-term care to Medicaid beneficiaries are not state actors, even though they operate under contract with the government and make need determinations authorized by statute); *Rendell-Baker v. Kohn*, 457 U.S. 830, 837-43 (1982) (holding that private schools are not state actors even though the government contracted with the schools to fulfill its statutory obligation to provide education to special-needs students). *But see* *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 291 (2001) (holding that a private organization overseeing nearly all public and private high school athletic events is a state actor); *West v. Atkins*, 487 U.S. 42, 54-58 (1988) (holding that a private doctor treating prisoners pursuant to a contract with a prison is a state actor).

10. See Dolovich, *supra* note 7, at 446-50 (arguing that private prisons fail to fulfill society’s obligations to inmates); Metzger, *supra* note 7, at 1373-74.

11. See, e.g., Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1300 (2003).

core military, foreign aid, and diplomatic functions. Military privatization entered the popular consciousness in early 2004, when private contractors working as interrogators and translators for the U.S. government abused detainees at Abu Ghraib prison in Iraq.¹² But this kind of military privatization is only the tip of the iceberg. Indeed, though the United States does not yet contract out direct combat functions, we now frequently turn to private actors to provide logistical support to those in combat on the battlefield as well as to aid in strategic planning and tactical advice.¹³ Other states, such as Sierra Leone, have used private contractors to engage in direct combat,¹⁴ and international organizations have weighed the possibility of using private contractors to perform peacekeeping.¹⁵ In the foreign aid context, states and international organizations are increasingly entering into agreements with private non-profit and for-profit entities to deliver all forms of aid, including humanitarian relief, development assistance, and post-conflict reconstruction.¹⁶ Even diplomatic tasks such as peacekeeping negotiations are being undertaken by private actors in conjunction with governments and international organizations.¹⁷

All of this privatization in the international sphere raises the same sort of question for international public law that domestic privatization raises for domestic public law: Will privatization erode fundamental public law values, such as human rights norms, norms against corruption and waste, and democratic process values?¹⁸ After all, international law norms, like many domestic constitutional norms, traditionally apply only to states. The Convention Against Torture, for example, generally prohibits only official

12. See Douglas Jehl & Kate Zernike, *Greater Urgency on Prison Interrogation Led to Use of Untrained Workers*, N.Y. TIMES, May 28, 2004, at A11.

13. See generally P.W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* (2003).

14. See Abraham McLaughlin, *Guns for Hire Thrive in Africa*, CHRISTIAN SCI. MONITOR, Mar. 15, 2004, at 6.

15. See, e.g., SINGER, *supra* note 13, at 182-86.

16. See, e.g., BEYOND U.N. SUBCONTRACTING: TASK-SHARING WITH REGIONAL SECURITY ARRANGEMENTS AND SERVICE-PROVIDING NGOS (Thomas G. Weiss ed., 1998) [hereinafter U.N. SUBCONTRACTING]; Ian Smillie, *At Sea in a Sieve? Trends and Issues in the Relationship Between Northern NGOs and Northern Governments*, in *STAKEHOLDERS: GOVERNMENT-NGO PARTNERSHIPS FOR INTERNATIONAL DEVELOPMENT* 7 (Ian Smillie & Henny Helmich eds., 1999) [hereinafter *STAKEHOLDERS*].

17. See, e.g., James L. Taulbee & Marion V. Creekmore, *NGO Mediation: The Carter Center*, in *MITIGATING CONFLICT: THE ROLE OF NGOS* 156 (Henry F. Carey & Oliver P. Richmond eds., 2003).

18. One can, of course, challenge the idea that certain values can even be labeled “public law values.” Indeed, as both critical legal studies and public choice theory teach, the line between the “public” and “private” is largely incoherent. Yet, that is precisely my point. Instead of seeing privatization solely as a threat to public values, as if there were some meaningful divide between the two, we should focus on the negotiated contractual relationships between the public and the private. As Jody Freeman has noted in discussing domestic privatization, “[t]he view that private actors . . . are menacing outsiders whose influence threatens to derail legitimate ‘public’ pursuits—features prominently in the dominant models of the field. And yet, private actors are also regulatory resources capable of contributing to the efficacy and legitimacy of administration. This realization suggests the possibility of harnessing private capacity to serve public goals.” Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 548-49 (2000). Similarly, I seek to use privatization contracts to pursue what are usually deemed the public ends of international law.

misconduct.¹⁹ Thus, we must ask: as more and more non-state contractors emerge on the international scene, will these individuals and groups necessarily fall through the cracks of international law and evade any public accountability?

My answer to that question is “no,” and in this Article I suggest that the domestic U.S. administrative law literature may provide a useful set of responses to privatization that has been largely overlooked by international law scholars, policy-makers, and activists. In particular, I argue that possibilities for extending public law values inhere in the privatized relationship itself, particularly in the government contracts that are the very engine of privatization. Indeed, the contracts governments enter into with non-state actors can include many provisions that would help to create both standards of behavior, performance benchmarks, and a means of providing some measure of public accountability. While such contractual provisions are not a panacea, they may be at least as effective as the relatively weak enforcement regime of public international law.²⁰ At the same time, by considering international privatization, I seek to open what I believe could be a fruitful dialogue between domestic administrative law scholars and international law scholars about possible responses.

Significantly, while domestic scholars of privatization have not yet turned their attention to foreign affairs privatization, international law scholars have not really focused on privatization at all, and, in any event, have not seriously considered contract as a source of solutions to the potential threat to public law values that privatization may seem to pose. Of course, international law scholars have recognized concerns about how to apply international legal norms to non-state actors in general.²¹ But “non-state actors” is too broad a category because a private contractor is very different from, say, a guerrilla soldier. In particular, because privatization involves an increasing contractual relationship between governments (or international organizations) and private actors, contractual mechanisms for importing public accountability are potentially available with regard to privatization, whereas they obviously are

19. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85, 113-14 (defining torture as certain activities designed to inflict pain or suffering when such “pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”). Of course, this international “state action” requirement can be challenged on a variety of grounds. *See infra* notes 120-124 and accompanying text.

20. Indeed, as I have noted elsewhere, in considering the question of whether privatization undermines international law’s public values, we need to recognize that it is not as if *state* actors are always held accountable for failing to uphold these values. *See* Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability under International Law*, 47 WM. & MARY L. REV. 135 (2005). After all, international law has often been criticized for having relatively weak enforcement mechanisms. *See, e.g.,* Louis Henkin, *Politics of Law-Making*, in INTERNATIONAL LAW: CLASSIC AND CONTEMPORARY READINGS 17, 18-20 (Charlotte Ku & Paul F. Diehl eds., 1998) (noting lack of enforcement in international human rights law). And while this fact may not be cause for celebration, it does serve to remind us that we do not quite lose as much when we privatize in the international sphere as we do when, for example, we privatize domestically.

21. *See, e.g.,* PHILIP ALSTON, NON-STATE ACTORS AND HUMAN RIGHTS (2005); Math Noortman, *Non-State Actors in International Law*, in NON-STATE ACTORS IN INTERNATIONAL RELATIONS 59, 71-72 (Bas Arts et al. eds., 2001).

not relevant to many other instances in which non-state actors play a role in the international sphere.

Moreover, to the extent that international law scholars and policy-makers have proposed any solutions to potential problems created by privatization, these proposals fall far short. At the extreme, some have argued that the best response to military outsourcing, for example, is simply to oppose it altogether, because military functions are somehow “inherently” governmental or because state bureaucracies can be better monitored and held to account in court than private contractors can.²² However, those who simply resist privatization are misguided because the trend toward outsourcing of foreign affairs functions previously performed by state bureaucracies (at least in the recent past) is probably irreversible. The privatization train has not only already left the station, but has gone far down the track. Indeed, even those who seek to send the train back home should favor alternative solutions in the interim, because any return is likely to take a very long time.

Others have argued that private actors with significant impact in the international sphere should be more formally brought within the normative framework of international law. Thus, with each wave of non-state actors—such as guerrilla movements,²³ terrorists,²⁴ non-governmental organizations,²⁵ and corporations²⁶—many international law practitioners and scholars have considered expanding the coverage of public international law to apply to each group. They have therefore contended either that states should (by treaty or customary international law) develop new norms that apply directly to these categories of non-state actors,²⁷ or that any “state action” requirements contained in existing norms (again either in treaties or customary international law) should be interpreted expansively to apply to non-state actors linked to the state.²⁸ At the same time, these scholars and practitioners have tended to focus on the need for courts and tribunals—in many cases new ones—to apply and interpret these norms.

22. John Sifton, Remarks on Private Military Contractors at Conference at Georgetown University Law Center (Apr. 2005).

23. See, e.g., Sylvie Junod, *Additional Protocol II: History and Scope*, 33 AM. U. L. REV. 29, 30-33 (1983).

24. See, e.g., Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 756-57 (2004).

25. See, e.g., Noortman, *supra* note 21, at 72.

26. See, e.g., Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 524-30 (2001) (arguing that more international law norms should be extended to bind corporations directly); see also David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901 (2003) (same). But see Carlos M. Vázquez, *Direct vs. Indirect Obligations of Corporations Under International Law*, 43 COLUM. J. TRANSNAT'L L. 927 (2005) (urging caution).

27. See Junod, *supra* note 23, at 34-38 (discussing guerrillas and insurgents); Noortmann, *supra* note 21, at 71-74 (discussing the “legal personality” of NGOs under international law); Ratner, *supra* note 26, at 524-27 (discussing corporations).

28. See, e.g., Draft Articles on Responsibility of States for Internationally Wrongful Acts, arts. 4, 8, in Int'l Law Comm'n, *Report of the International Law Commission on the Work of Its Fifty-Third Session*, U.N. Doc. A/56/10 (2001) (stating that the “conduct of any State organ shall be considered an act of that State under international law,” and that a person’s conduct shall be attributed to the state if he or she is acting on the state’s instructions or under the state’s direction).

Yet this approach, though it is important because it results in the articulation of norms in the international sphere, can have only a limited effect. Even if the proposed courts and tribunals are established and fully functioning, and even if they expand the norms of international law to apply to the broad range of privatized action, these tribunals will never have the capacity to hold more than a limited number of individuals (and groups) to account. Accordingly, we need to seek alternative mechanisms for extending and implementing public law values to privatized actors in the international sphere. And though literature on corporate responsibility,²⁹ NGOs,³⁰ soft law,³¹ and transnational networks³² has attempted to address some informal modes of accountability, international law scholars have so far not sufficiently discussed the possibility of contract.

This Article begins by laying out the scope of the problem, surveying the extent of foreign affairs privatization, the potential threat it poses to public law values, and the failure of current outsourcing contracts to address this problem. Using Iraq as a case study, I examine the publicly available military contracts as well as contracts to provide foreign aid, and I suggest serious deficiencies in the contracts thus far. Then, drawing on examples and insights from the domestic privatization literature, I set forth nine ways in which contractual provisions could be used to extend and enforce public law values in the foreign affairs privatization context. Specifically, I suggest that contracts be drafted to: explicitly extend relevant norms of public international law to private contractors, delineate training requirements, provide for enhanced monitoring both within the government and by independent third-party monitors, establish clear performance benchmarks, require accreditation, mandate self-evaluation by the contractors, provide for governmental takeovers of failing contracts, include opportunities for public participation in the contract negotiation process, and enhance whistleblower protections and rights of third-party beneficiaries to enforce contractual terms. And, because these public values would be embodied in that quintessential private law instrument—the contract—they would more readily come within the purview of domestic courts or private arbitral bodies and so would rely less on international public law enforcement mechanisms (though those are possible as well). As a result, these contractual provisions may at least make some progress in attempting to ensure that private contractors are accountable both to the publics they serve and to those who are most affected by their work.

29. See David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931, 952-58 (2004); Sean Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 COLUM. J. INT'L L. 389, 424-30 (2005); Ratner, *supra* note 26, at 531-34; Ralph G. Steinhardt, *Corporate Responsibility and the International Law of Human Rights: The Next Lex Mercatoria*, in ALSTON, *supra* note 21, at 177-226.

30. See Leon Gordenker & Thomas G. Weiss, *Pluralizing Global Governance: Analytical Approaches and Dimensions*, in NGOs, THE U.N., AND GLOBAL GOVERNANCE 1, 40-43 (Leon Gordenker & Thomas G. Weiss eds., 1996) [hereinafter GLOBAL GOVERNANCE].

31. See DINAH SHELTON, COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (2003).

32. See ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004).

Of course, one might think that these proposals are unrealistic because one of the main reasons governments privatize is precisely to *avoid* the kind of accountability I propose. Yet governments are not monolithic, and there are undoubtedly many people within bureaucracies, such as contract monitors, who honestly wish to do their job and would therefore welcome (and lobby for) contractual mechanisms that increase accountability. In addition, non-governmental organizations (NGOs) and international organizations can sometimes pressure states to adopt oversight regimes such as the ones I discuss. The problem is that the policymakers and scholars have not sufficiently focused on privatization or the possible accountability mechanisms that could be embodied in contracts. Thus, this Article seeks both to raise awareness about the ways in which contractual provisions might embody public law values and to stimulate a broader-ranging debate about the best way to respond to privatization in the international context.

II. FOREIGN AFFAIRS PRIVATIZATION AND THE THREAT TO PUBLIC LAW VALUES

States and international organizations are increasingly turning to private entities, both for-profit and non-profit, to fulfill a broad range of foreign affairs functions. Just as they are contracting with private organizations to provide domestic services such as welfare, health care, education, and prison management, they are also outsourcing military and intelligence activities, foreign aid, and diplomatic tasks. Yet, until recently, this trend has largely escaped scholarly attention. Moreover, to the extent that scholars have addressed this issue, they have not examined the full scope of privatization across a number of different areas of state activity.³³ This Part briefly maps out the broad-ranging nature of foreign affairs privatization and then discusses the dangers such outsourcing poses to public law values.

33. To date, military/security privatization has generated the most scholarly attention. See generally SINGER, *supra* note 13; Tina Garmon, *Domesticating International Corporate Responsibility: Holding Private Military Firms Accountable Under the Alien Tort Claims Act*, 11 TUL. J. INT'L & COMP. L. 325 (2003); Todd S. Milliard, *Overcoming Post-Colonial Myopia: A Call To Recognize and Regulate Private Military Companies*, 176 MIL. L. REV. 1 (2003); Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879 (2004); Peter Warren Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521 (2004); Juan Carlos Zarate, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, 34 STAN. J. INT'L L. 75 (1998). Other scholars have focused on privatized foreign aid. See Gordenker & Weiss, *supra* note 30, at 1; Smillie, *supra* note 16, at 7. However, not only do these specialized studies necessarily tell only part of the story, they do not systematically explore the possibility of using contractual mechanisms to hold private actors accountable, nor do they draw on the domestic administrative law literature on privatization. At the same time, domestic administrative law scholars have not generally applied their insights to the international context, though there are important exceptions. See generally, e.g., ALFRED C. AMAN, JR., *THE DEMOCRACY DEFICIT, TAMING GLOBALIZATION THROUGH LAW REFORM* 154-55 (2004) (identifying the democracy deficit created by privatization and situating that deficit within a global context); Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism and Democracy*, 46 B.C. L. REV. 989 (2005) (identifying the problems of military privatization).

A. *The Scope of Foreign Affairs Privatization: Military, Foreign Aid, and Diplomatic Functions*

The degree to which states and international organizations have farmed out foreign affairs activities to private actors is truly breathtaking. It would not be an exaggeration to say that the U.S. government has hired private entities to help fight our wars, to deliver much of our foreign aid, and to play an important role mediating our conflicts and engaging in other diplomatic activities. Many other states are pursuing a similar course. International organizations are likewise turning to private entities to support peacekeeping and to deliver all manner of humanitarian, development, and post-conflict reconstruction assistance, as well as to participate in peacemaking negotiations.

The privatization of military functions is perhaps the most remarkable example. Probably no function of government is deemed more quintessentially a “state” function than the military protection of the state itself, and some scholars of privatization in the domestic sphere have assumed that the military is one area where privatization does not, or should not, occur.³⁴ Indeed, some have argued that, by hiring private armies to keep itself secure, the state would threaten its own existence because it would have no way to control these private military actors.³⁵

Yet, governments around the world, including the United States, are increasingly hiring private military companies to perform core military functions.³⁶ For decades, of course, the U.S. government has entered into agreements with private companies to build weapons and other equipment, as well as to provide the basic goods necessary to run a government agency—everything from desks to office supplies.³⁷ However, such contracting activity now covers services to active troops in the field.³⁸ These activities include not only support services, such as food, accommodations, and sanitation for troops on the battlefield, but also core functions such as intelligence gathering, communications, weapons maintenance, and even troop training.³⁹ According to one commentator, “while contractors have long accompanied U.S. armed forces, the wholesale outsourcing of U.S. military services since the 1990s is unprecedented.”⁴⁰

Indeed, if one looks to U.S. forces deployed on the battlefield, the ratio of private contractors to troops has increased dramatically in the past fifteen

34. Cf. Freeman, *supra* note 11, at 1295, 1300.

35. See, e.g., Rosky, *supra* note 33, at 882-83 (stating that a state in which the supply of military force is entirely private is more vulnerable to military revolt than one in which the supply of military force is entirely public and that “the intensity of force justifies the state’s monopoly of the supply of force”).

36. See SINGER, *supra* note 13, at 3-17.

37. See Rebecca Rafferty Vernon, *Battlefield Contractors: Facing the Tough Issues*, 33 PUB. CONT. L.J. 369, 371-72 (2004).

38. *Id.*

39. *Id.* at 416 n.312.

40. SINGER, *supra* note 13, at 16.

years. In the first Gulf War, the ratio was roughly one to one hundred;⁴¹ in the current war in Iraq, the ratio is one to ten.⁴² Although the United States has not yet used the employees of private companies in actual combat roles,⁴³ it has deployed them to fulfill tasks such as military intelligence gathering, troop training, weapons maintenance, and support functions that are very close to combat; these private actors even have the power to wield force in a variety of circumstances.⁴⁴ Other countries, such as Sierra Leone and Angola, have explicitly hired private armies.⁴⁵ In many modern conflicts, these private military companies have played a decisive role.⁴⁶

The pervasiveness of the U.S. military's use of contractors captured media attention with news of their role in Iraq. When stories surfaced that U.S. military personnel had abused detainees at Abu Ghraib prison in Iraq, it soon became clear that private contractors employed by CACI, Inc. and working under an agreement with the Department of the Interior had participated in the abuse.⁴⁷ Indeed, intelligence operatives may actually have given orders to uniformed military.⁴⁸ Translators hired under a similar contract with the firm Titan, Inc. were also implicated in the abuse.⁴⁹ News of gruesome security contractor killings by Iraqi insurgents has sparked additional popular attention.⁵⁰

Yet, CACI is not an anomaly. Firms such as Kellogg, Brown, and Root (KBR) have for years built and maintained military bases, transported troops and equipment to and on the battlefield, repaired and maintained roads and vehicles, distributed water and food to troops, washed laundry, refueled equipment, attended to hazardous materials, and performed related environmental services,⁵¹ earning roughly \$1.7 billion annually from military

41. George Cahlink, *Army of Contractors*, GOV'T EXEC, Feb. 1, 2002, at 43, available at <http://www.govexec.com/features/0202/0202s5.htm>.

42. Singer, *supra* note 33, at 523.

43. Office of Management and Budget Circular A-76, first issued in 1966 and revised as recently as 2003, requires agencies to outsource all functions that are not "inherently-governmental." OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, OMB CIRCULAR A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES 1-3 (2003), available at http://www.whitehouse.gov/omb/circulars/a076/a76_rev2003.pdf. In 1998, Congress gave added force to Circular A-76 by mandating that all agencies must identify government positions that are not "inherently governmental" and contract with the private sector to fill those positions if doing so would be more efficient than filling them with governmental employees. Implementation of the Federal Activities Inventory Reform (FAIR) Act of 1998, 64 Fed. Reg. 33,927 (June 24, 1999). Inherently governmental functions may not be outsourced, however, and such functions include combat positions. See Michael J. Davidson, *Ruck Up: An Introduction to the Legal Issues Associated with Civilian Contractors on the Battlefield*, 29 PUB. CONT. L.J. 233, 256-58 (2000).

44. Vernon, *supra* note 37, at 407-09.

45. See *We're the Good Guys These Days*, ECONOMIST, July 29, 1995, at 32.

46. See Zarate, *supra* note 33, at 94-97.

47. See MAJ. GEN. ANTONIO TAGUBA, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE, 26, 36, 48 (2004) [hereinafter TAGUBA REPORT]; SEYMOUR M. HERSH, CHAIN OF COMMAND 32-34, 61 (2004); Joel Brinkley & James Glanz, *Contractors in Sensitive Roles, Unchecked*, N.Y. TIMES, May 7, 2004, at A15.

48. HERSH, *supra* note 47, at 61.

49. See TAGUBA REPORT, *supra* note 47, at 26, 36, 48; Brinkley & Glanz, *supra* note 47, at A15.

50. James Dao, *Private Guards Take Big Risks, for Right Price*, N.Y. TIMES, Apr. 2, 2004, at A1.

51. See, e.g., Halliburton Company, About KBR, <http://www.halliburton.com/kbr/aboutKBR/>

work.⁵² Beyond this logistical support, other companies provide core military functions such as troop training and intelligence gathering. For example, since 1996, another U.S. company, Military Professional Resources Incorporated (MPRI) has run the ROTC training programs at universities around the country and has played a key role in numerous programs to educate U.S. forces, including officer training, war gaming, and tactical planning.⁵³ In recent years, moreover, MPRI has expanded its services to a wide variety of countries, including Croatia, Bosnia, Angola, Saudi Arabia, Sri Lanka, Nigeria, and Equatorial Guinea,⁵⁴ as well as to regional intergovernmental programs such as the African Crisis Response Initiative.⁵⁵ Finally, and most controversially, military companies have provided direct combat services. For example, the now-dissolved South African company Executive Outcomes, which drew its personnel largely from the apartheid-era South African Defense Force, won contracts with governments in Angola, Sierra Leone, Uganda, Kenya, South Africa, Indonesia, Congo, and others to engage in direct combat during the 1980s and 1990s.⁵⁶ Indeed, its activities in Sierra Leone and Angola are widely believed to have altered the outcome of the conflicts in those states.⁵⁷

Although privatization in the military context has received far more attention, overseas aid is another area in which states are also increasingly turning to private contractors to fulfill functions formerly performed directly by the state.⁵⁸ From emergency humanitarian relief, to long-term development assistance, to post-conflict reconstruction programs, private actors under contract with the United States, other governments, and international organizations are taking a larger and larger role. The most dramatic surge in privatized aid has involved humanitarian relief. The United States, for example, has contracted with private companies such as KBR to build refugee camps,⁵⁹ and with nonprofit NGOs such as Save the Children to deliver relief supplies and medical services.⁶⁰ For fiscal year 2003, the USAID Office of U.S. Foreign Disaster Assistance spent sixty-six percent of its nearly \$300 million budget through NGOs.⁶¹ Other countries and international

index.jsp (last visited Apr. 12, 2005).

52. SINGER, *supra* note 13, at 139.

53. See News Release, Army Reserve 88th Regional Readiness Command, Team MPRI Looking for ROTC Instructors (July 3, 2000), available at http://www.usarc.army.mil/88thrc/news/archive/news_rotc_instructors_needed.asp; see also MPRI, National Overview, http://www.mpri.com/site/nat_overview.html (last visited Apr. 30, 2005).

54. SINGER, *supra* note 13, at 130-32.

55. *Id.* at 131.

56. See *We're the Good Guys These Days*, *supra* note 45, at 32.

57. See Zarate, *supra* note 33, at 94-97.

58. Ian Smillie, *United States*, in *STAKEHOLDERS*, *supra* note 16, at 253.

59. See SINGER, *supra* note 13, at 144.

60. See USAID, DCHA/PVC-ASHA PORTFOLIO, FISCAL YEAR 2004, at B-5 (2005), available at http://www.usaid.gov/our_work/cross-cutting_programs/private_voluntary_cooperation/portfolio05.pdf.

61. USAID OFFICE OF U.S. FOREIGN DISASTER ASSISTANCE, ANNUAL REPORT 14 (2003), available at www.usaid.gov/our_work/humanitarian_assistance/disaster_assistance/publications/annual_reports/pdf/AR2003.pdf.

organizations are similarly turning to NGOs to deliver humanitarian aid.⁶² Longer-term development aid has followed a similar trend. By the mid-1980s, development agencies had begun to shift their focus from general funding for foreign governments to more targeted direct support both to grassroots organizations helping to eradicate poverty and to other civil society institutions seen as necessary for democracy and development.⁶³ In the United States, for example, the government now uses both international and foreign NGOs to deliver much of its aid overseas, rather than providing aid directly to foreign governments.⁶⁴ As the cases of Iraq and Afghanistan make clear, privatization is also taking place in the arena of post-conflict reconstruction, with multimillion dollar contracts awarded not only to nonprofit organizations but to for-profit corporations as well.⁶⁵ Indeed, so far in Iraq USAID has awarded fifteen contracts worth a total of \$3.2 billion to for-profit companies, while it has awarded only six grants worth \$40 million to nonprofit organizations.⁶⁶

In addition to military and foreign assistance functions, governments have also turned to private entities to assist in peacemaking and other diplomatic tasks. The Carter Center, probably the best-known organization in this field, has engaged in high-level diplomatic efforts to avoid or end conflicts at the behest of governments around the world.⁶⁷ For example, in 1994, former President Carter assisted the U.S. government in reopening talks with North Korea, negotiating an agreement for the peaceful departure of Raoul Cedras from power in Haiti (thereby averting the need for increased U.S. military intervention), and also brokering a ceasefire in Bosnia.⁶⁸ More recently, the Center has engaged in peacemaking activities at the request of

62. Smillie, *supra* note 16, at 9 (describing foreign aid in France, Sweden, and the EU); *see also* Andrew S. Natsios, *NGOs and the U.N. System in Complex Humanitarian Emergencies: Conflict or Cooperation?*, in *GLOBAL GOVERNANCE*, *supra* note 30, at 73 (noting the relationships of UNICEF and UNHCR with NGOs); Ruth Wedgwood, *Legal Personality and the Role of Non-Governmental Organizations and Non-State Political Entities in the United Nations System*, in *NON-STATE ACTORS AS NEW SUBJECTS OF INTERNATIONAL LAW* 21, 23 (Rainer Hofmann ed., 1998) (describing the use of private contractors by UNHCR).

63. *See, e.g.*, Mark Duffield, *NGO Relief in War Zones: Toward an Analysis of the New Aid Paradigm*, in *U.N. SUBCONTRACTING*, *supra* note 16, at 139, 146 (“By the mid-1980s, a noticeable change in donor funding policy had occurred, from direct donor assistance to recognized governments in favour of international support for private, non-governmental sectors.”).

64. *See* Gordenker & Weiss, *supra* note 30, at 17, 37.

65. *See* USAID, *ASSISTANCE FOR IRAQ: ACQUISITION AND ASSISTANCE ACTIVITIES* (2005), available at <http://www.usaid.gov/iraq/activities.html> [hereinafter *ACQUISITION AND ASSISTANCE*].

66. *Id.* Although USAID has awarded a total of sixteen contracts, one of those contracts was awarded to the U.S. Air Force, so I did not include it in the total. *Id.*; *see also* Rony Brauman & Pierre Salignon, *Iraq: In Search of a ‘Humanitarian Crisis’*, in *IN THE SHADOW OF ‘JUST WARS’: VIOLENCE, POLITICS AND HUMANITARIAN ACTION* 269, 271 (Fabrice Weissman ed., 2004) (noting increased use of for-profit aid providers in Iraq) [hereinafter *IN THE SHADOW*].

67. *See* Taulbee & Creekmore, *supra* note 17, at 156-71 (discussing the Carter Center, a prominent NGO in these fields).

68. *Id.*

numerous governments, including Uganda, Sudan, and Ecuador.⁶⁹ Other organizations have performed similar roles around the world.⁷⁰

Finally, it is important to note that, in addition to states, international organizations such as the United Nations have also turned to private entities.⁷¹ For example, the office of the United Nations High Commissioner for Refugees (UNHCR) has entered partnerships with hundreds of NGOs around the world for services including refugee protection, community services, field security, child protection, engineering, and telecommunications in emergency relief situations.⁷² Although the United Nations has not deployed private military firms in combat roles,⁷³ some policymakers and commentators have suggested that such a step would provide badly needed help to peacekeeping and peace enforcement operations.⁷⁴ And even those who do not endorse a direct combat role for private firms nonetheless argue that the United Nations should privatize military logistics functions, much as the U.S. government has done.⁷⁵

To be sure, one might argue that privatization in all of these areas of foreign affairs is nothing new. With respect to the military, mercenaries (loosely defined as soldiers working for private gain) have appeared throughout history. From the Swiss guards of the Middle Ages, to the merchant-armies of the British and Dutch East India Companies during the colonial period, to the privateers of early America, to the French Foreign Legion still active today, mercenaries have played a significant role over the centuries.⁷⁶ Indeed, before the Treaty of Westphalia, which marked the emergence of the state system that eventually gave rise to large standing national armies, mercenaries were the norm rather than the exception.⁷⁷ By the twentieth century, however, apart from some post-colonial wars of independence (where mercenaries often fought against national liberation movements), the bulk of military security work has been performed by professionalized, bureaucratized armies and not private actors.⁷⁸ It is against

69. The Carter Center, International Conflict Resolution and Management, <http://cartercenter.org/peaceprograms/program12.htm> (last visited Aug. 16, 2005).

70. For example, the Public International Law and Policy Group has represented numerous countries, including Bosnia, Somalia, and Sudan, in peace negotiations. Public International Law and Policy Group, Peace Negotiations and Post-Conflict Constitutions, <http://www.areas/peacebuilding/negotiations/index.html> (last visited Aug. 16, 2005).

71. See generally U.N. SUBCONTRACTING, *supra* note 16 (analyzing devolution and task sharing by the U.N. and the implications for global governance); see also Natsios, *supra* note 62, at 73 (noting the relationships of UNICEF and UNHCR with NGOs); Wedgwood, *supra* note 62, at 23 (describing the use of private contractors by UNHCR).

72. UNHCR, NGO PARTNERSHIPS IN REFUGEE PROTECTION 16 (2004), available at <http://www.unhcr.org/cgi-bin/texis/vtx/partners/openssl.pdf?tbl=PARTNERS&id=41c162d04>.

73. Thalif Deen, *U.N. Rejects Private Peacekeepers*, INTER-PRESS NEWS, Aug. 27, 2004.

74. See, e.g., U.K. FOREIGN AND COMMONWEALTH OFFICE, PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION, 2001-02, H.C. 577, at 18, available at <http://www.fco.gov.uk/Files/kfile/mercenaries,0.pdf>.

75. Peter H. Gantz, *Refugees International, The Private Sector's Role in Peacekeeping and Peace Enforcement*, GLOBAL POL'Y F., Nov. 18, 2003, <http://www.globalpolicy.org/security/peacekpg/training/1118peacekeeping.htm>.

76. Milliard, *supra* note 33, at 2-3.

77. *Id.*

78. SINGER, *supra* note 13, at 8.

this backdrop that we have seen, over the past two decades, the increasing re-privatization of military functions.

Likewise, the privatization of foreign aid and diplomacy are not wholly recent developments. With respect to foreign aid, private groups from the United States funneled aid overseas for specific causes long before the government developed foreign assistance programs.⁷⁹ Indeed, the practice of *government*-sponsored foreign assistance did not develop in a significant way in the United States until the initiation of the Marshall Plan during the period following World War II.⁸⁰ However, from the 1950s through the 1970s, much of the aid consisted of direct grants to needy countries.⁸¹ In contrast, as noted previously, over the past two decades the government has delivered more and more foreign aid through nongovernmental actors.⁸² And with respect to diplomacy, private organizations have long played a role in ongoing peace negotiations and other efforts, but the high-level diplomatic work of organizations such as the Carter Center is new and distinctive.⁸³

The forces driving this trend toward privatization are not fully understood, but the dominant rationale articulated by most scholars of the subject is the promise of cutting costs.⁸⁴ The government need not offer pensions or benefits to employees of private companies working under contract, and it can hire contractors on a short-term basis, thereby decreasing the size of government bureaucracies. Moreover, unlike many governmental employees, private contractors are typically not unionized. The lack of unionization fuels the political support of those on the right, and, at least in the United States, there tends to be broad bi-partisan support for any trend that seems to make government “smaller” and “more efficient.” In addition, in the case of the military, private military companies may offer governments greater flexibility. Such companies are touted for their ability to work quickly,⁸⁵ and in states with ill-equipped, poorly functioning militaries, private companies can provide badly needed expertise to help train, or even replace,

79. The international non-governmental organization movement has its roots in missionary activities that date back to the sixteenth century. Smillie, *supra* note 16, at 8. Beginning with the founding of the Red Cross in 1860, many secular international NGOs were born out of the conflicts and social movements of the nineteenth and twentieth centuries. *Id.* For example, Save the Children, established in 1920, developed as a response to World War I; Foster Parents Plan emerged after the Spanish Civil War (1936-39); Oxfam and CARE from World War II; World Vision from the Korean War (1950-53); and Médecins Sans Frontières from the conflict in Biafra (1967-70). *See id.* Further growth occurred in the 1960s and the 1970s, stimulated in part by operations such as the Peace Corps, as well as the burgeoning human rights, environmental, and women’s movements. *Id.* at 8.

80. *See generally* Video: The Marshall Plan Study Guide (USAID), <http://www.usaid.gov/multimedia/video/marshall/study.html> (last visited Apr. 12, 2005).

81. *Cf.* Smillie, *supra* note 16, at 249 (discussing the history of private aid organizations, including growth in the 1960s and 1970s).

82. *See supra* notes 58-66 and accompanying text.

83. Taulbee & Creekmore, *supra* note 17, at 156.

84. *See* Barry Yeoman, *Need an Army? Just Pick Up the Phone*, N.Y. TIMES, Apr. 2, 2004, at A19. It should be noted, however, that these cost savings have not been conclusively demonstrated. Indeed, private military companies typically pay their employees more than government employees, and because of the types of contracts they receive, private military companies are particularly susceptible to cost overruns.

85. Samantha M. Shapiro, *Iraq, Outsourced*, N.Y. TIMES MAGAZINE, Dec. 14, 2003, at 79 (quoting Steve Schooner).

government troops.⁸⁶ Using private military companies can also offset shortages of troops by offering a rapid means of growing a state's military capacity, and states can deploy their forces with lower domestic political costs because fewer uniformed troops are put at risk, thus keeping official casualty figures down.⁸⁷ Finally, some have suggested that the growth of private military firms has been fueled in part by the labor pool created as many military dictatorships and their accompanying security forces have been dismantled during transitions to democracy.⁸⁸

Foreign aid privatization also appears to be motivated largely by a desire to cut costs. Certainly in the United States the outsourcing of aid is linked to the political push for smaller government, combined with weak political support for foreign aid generally. Indeed, USAID, perhaps motivated in part by the need to justify its activities to an increasingly skeptical Congress, was one of the first agencies in the United States to take then-Vice President Al Gore's "Reinventing Government" message to heart, declaring in 1994 that "USAID is now fully committed to reinventing itself as a more efficient, effective, and results-oriented organization."⁸⁹

The privatization of diplomatic tasks such as peacemaking has received even less scholarly attention than other forms of foreign affairs privatization, and the reasons behind this trend are thus even less clear. It appears, however, that the growing use of private entities in this arena has stemmed from the high-level experience of those such as former President Carter who have founded and worked for such organizations, as well as the organizations' independence, which frees them from some of the political costs of sensitive diplomatic efforts.⁹⁰

Thus, the recent rise of privatization does represent a shift, at least as compared to the recent past, away from the large, highly-bureaucratized state. Just as states are outsourcing their domestic functions, they are also outsourcing their foreign affairs activities. And while the surge in foreign affairs privatization raises many questions that merit further study,⁹¹ a central issue presented by this trend is whether increased outsourcing undermines the public law values that apply primarily to state actors.

86. See Garmon, *supra* note 33, at 331-34.

87. Yeoman, *supra* note 84, at A19. The promise of placing fewer uniformed troops at risk is, of course, not always fulfilled. For example, after four Blackwater security contractors were killed in Fallujah in March, 2004, and their burned bodies hung from a bridge, the American military launched major assaults on Fallujah in April and November of that year, resulting in some of the highest U.S. military casualty numbers of the war.

88. See *We're the Good Guys These Days*, *supra* note 45, at 32.

89. USAID, *ENHANCING AID'S ABILITY TO MANAGE FOR RESULTS* (1994).

90. See, e.g., Taulbee & Creekmore, *supra* note 17, at 170.

91. It remains unclear whether foreign affairs privatization yields the efficiency gains that are often touted to garner support for the practice. For example, because of the lack of competition in the military contracting process, due in part to security concerns, as well as poor monitoring, it may be that outsourcing actually increases governmental expenditures. See *Waste, Fraud, and Abuse in U.S. Government Contracting in Iraq: Hearing Before the S. Democratic Policy Comm.*, 109th Cong. 10 (2005) [hereinafter *SDPC Hearing*] (statement of Franklin Willis) (arguing that choice of poorly qualified Iraq security contractors, due in part to lack of competition in contractor selection, along with virtually non-existent monitoring has cost taxpayers millions of dollars).

B. *The Threat to Public Law Values*

Just as the protections contained in the U.S. Constitution are generally viewed as prohibitions on state misconduct only,⁹² the principal international human rights and humanitarian law instruments of the twentieth century—the United Nations Declaration on Human Rights,⁹³ the International Covenant on Civil and Political Rights,⁹⁴ the International Covenant on Economic, Social and Cultural Rights,⁹⁵ the Genocide Convention,⁹⁶ the Convention Against Torture,⁹⁷ the Fourth Geneva Conventions,⁹⁸ and the Rome Statute of the International Criminal Court⁹⁹—were drafted primarily with states in mind. As such, at least in the conventional account of public international law, states are seen as both the primary parties to the treaties and the central bearers of rights and responsibilities. These instruments do grant individuals rights, of course—such as the right to be free from torture, cruel, inhuman or degrading treatment, or the right to a fair trial—but these are generally conceived primarily as rights against the state.¹⁰⁰ Conversely, individuals can be held criminally liable, but usually only if some connection to the state is demonstrated. And while there are some exceptions within the overarching framework of public international law—for example, individuals can be convicted for genocide and crimes against humanity (as defined in the recent statute of the International Criminal Court) regardless of any connection to a state apparatus¹⁰¹—state action (or at least a link to it) still remains at the core of most conceptions of international law liability.

The private contractor interrogators and translators implicated in the abuse at Abu Ghraib prison provide a notable example of how these non-state actors might fall through the cracks of this traditional, state-centered approach to public international law. Although the Geneva Conventions and the

92. See *supra* notes 8-9 and accompanying text.

93. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

94. International Covenant on Civil and Political Rights, Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR].

95. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. EXEC. DOC. D, 95-2 (1978), 993 U.N.T.S. 3 [hereinafter ICESCR].

96. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

97. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1456 U.N.T.S. 85 (1984) [hereinafter Torture Convention].

98. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

99. Rome Statute of the International Criminal Court arts. 8(2)(b)(xxii), 8(2)(e)(vi), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter ICC Statute].

100. The Torture Convention, for example, defines as torture only acts that are committed “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” Torture Convention, *supra* note 97, art. 1. The ICCPR likewise defines the rights to a fair trial as rights in proceedings before public “courts and tribunals.” ICCPR, *supra* note 94, art. 14.

101. The Genocide Convention provides explicitly that “[p]ersons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.” Genocide Convention, *supra* note 96, art. 4. The definition of crimes against humanity requires only that the attacks be committed as part of a “State or organizational” policy. ICC Statute, *supra* note 99, art. 7(2)(a).

Convention Against Torture clearly prohibit any abuses committed by US military personnel,¹⁰² the treaties' applicability to non-state actors is ambiguous, and fora for holding non-state actors accountable are limited.¹⁰³ The U.S. government's use of private contractors to transport terrorism suspects to countries known to practice torture¹⁰⁴ has raised similar questions because again, while the Convention Against Torture prohibits governments from taking such actions, its applicability to private actors is ambiguous.¹⁰⁵

Private military companies engaging in direct combat also arguably fall through the cracks of current international law provisions, despite probably being the most notorious for committing atrocities. Although multiple treaties ban the use of certain categories of mercenaries outright, broad gaps in the definition of "mercenary" leave most types of work by private military companies outside the treaties' prohibitions.¹⁰⁶ For example, in Sierra Leone in the 1990s officers of Executive Outcomes, working under contract with the government, reportedly ordered employees carrying out air strikes against rebels to "[k]ill everybody," even though the employees had told their superiors they could not distinguish between civilians and rebels.¹⁰⁷ While such a command would almost certainly constitute a war crime if ordered by a military or civilian authority in the chain of command, it is less clear that such actions committed by private contractors would qualify, at least absent inquiry into the extent of the contractor's link to the government.

Abuses committed by private actors who deliver aid also raise complicated questions about the application of international law. Although aid workers do not by any means regularly mistreat aid beneficiaries, such

102. Under international law, the abuses could be characterized as torture; cruel, inhuman, or degrading treatment; or war crimes. See ICC Statute, *supra* note 99, arts. 1, 16; Fourth Geneva Convention, *supra* note 98, art. 147; Torture Convention, *supra* note 97, art. 8. The acts might also constitute crimes against humanity, if the abuses were "widespread or systematic" and committed "pursuant to . . . a State or organizational policy." ICC Statute, *supra* note 99, art. 7.

103. See Dickinson, *supra* note 20; see also Adam Liptak, *Who Would Try Civilians from U.S.? No One in Iraq*, N.Y. TIMES, May 26, 2004, at A11. To be sure, a civil suit under the Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350 (2000), already has been filed against the contractors implicated at Abu Ghraib for violations of international law. See T. Christian Miller, *Ex-Detainees Sue 2 U.S. Contractors*, L.A. TIMES, June 10, 2004, at A9. Because it has been brought against private parties, the suit will need to demonstrate a link to state action, at least with respect to the claims of torture and other norms that require such a link. In the Abu Ghraib setting, however, such a link may not be so difficult to establish because the private contractors were working in a facility actually run by the U.S. government. Nevertheless, ATCA suits are not likely to be an option in all but a handful of the most egregious cases. See *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (upholding the ATCA as a tool for non-Americans to bring civil suits in U.S. courts, but only for violations of a relatively narrow class of norms).

104. On December 18, 2001, "American operatives participated in what amounted to the kidnapping of two Egyptians . . . who had sought asylum in Sweden." HERSH, *supra* note 47, at 53. Believed to be linked to Islamic militant groups, the Egyptians "were abruptly seized in the late afternoon and flown out of Sweden a few hours later on a U.S. government-leased Gulfstream 5 private jet to Cairo, where they underwent extensive, and brutal, interrogation." *Id.* The company that owns the jet is apparently a corporation registered in Delaware and represented by the Massachusetts law firm Hill & Plakias. Farah Stockman, *Terror Suspects' Torture Claims Have Mass. Link*, BOSTON GLOBE, Nov. 29, 2004, at A1.

105. *Torture Convention*, *supra* note 97, art. 3 ("No State Party shall expel, return . . . or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.") (emphasis added).

106. See Milliard, *supra* note 33, at 19-69 (summarizing treaties).

107. Elizabeth Rubin, *An Army of One's Own*, HARPER'S, Feb. 1997, at 48.

incidents occur more often than one might suspect. For example, employees of Dyncorp Inc., a private corporation that was charged with training police in Bosnia in the 1990s under a contract with the U.S. government, were “implicated in a sex-trafficking scandal” involving acts of rape, sexual abuse, and exploitation.¹⁰⁸ Even staff members of not-for-profit organizations have at times been implicated in abuses. Indeed, a recent study of refugees and internally displaced persons in West African camps in Guinea, Liberia, and Sierra Leone reported widespread rape and sexual exploitation of women and children by many actors, including aid workers.¹⁰⁹ The aid workers and peacekeeping forces allegedly relied on their positions of relative power to use “the very humanitarian aid and services intended to benefit the refugee population as a tool of exploitation.”¹¹⁰ In some camps, it appears that even necessities such as using a toilet were sometimes conditioned on the willingness to perform sexual favors.¹¹¹ Although, as in the military context, such abuses committed by governmental actors generally violate international agreements, the same acts committed by non-state actors fall into a gray area.¹¹²

Even outside the human rights context, the principal regional treaties seeking to deter corruption, for example, apply primarily to misconduct involving governmental actors.¹¹³ Yet, foreign aid contractors have been implicated in fraud and waste. Indeed, Kellogg Brown & Root’s more than \$10 billion in contracts with the U.S. government in Iraq “have been dogged

108. Yeoman, *supra* note 84, at A19. Although Dyncorp offers security services under the contract, I include it and other such contracts within the foreign aid section because they provide assistance to a foreign country, as opposed to assistance to the U.S. military.

109. UNHCR & SAVE THE CHILDREN UK, NOTE FOR IMPLEMENTING AND OPERATIONAL PARTNERS ON SEXUAL VIOLENCE & EXPLOITATION (2002), *available at* <http://www.reliefweb.int/rw/rwb.nsf/AllDocsByUNID/6010f9ed3c651c93c1256b6d00560fca>; *see also* Michel Alger & Francoise Bouchet-Soulinier, *Humanitarian Spaces: Spaces of Exception*, in *IN THE SHADOW*, *supra* note 66, at 297, 302 (describing such abuses in refugee and IDP camps in Guinea, Liberia, and Sierra Leone); Fabrice Weissman, *Sierra Leone: Peace at Any Price*, in *IN THE SHADOW*, *supra* note 66 (describing sexual exploitation by aid workers in IDP camps in Sierra Leone).

110. *See* Scott A. Levin, *Sexual Exploitation of Refugee Children by U.N. Peacekeepers*, 19 N.Y.L. SCH. J. HUM. RTS. 833, 834-35 (2003).

111. *See* Malinda M. Schmichen, *Parallel Lives, Uneven Justice: An Analysis of Rights, Protection and Redress for Refugee and Internally Displaced Women in Camps*, 22 ST. LOUIS U. PUB. L. REV. 473, 490 (2003).

112. For example, rape or other sexual abuse committed by a public official would in many cases constitute torture under the Convention Against Torture, but similar actions taken by a non-state actor would not, unless undertaken with the “consent or acquiescence” of such an official. Torture Convention, *supra* note 97, art. 1. Rape and related sexual violence are also considered war crimes if committed in either international or internal armed conflict, but only those individuals acting under the authority of the actual parties to the conflict may be held criminally responsible for such acts. ICC Statute, *supra* note 99, arts. 8(2)(b)(xxii), 8(2)(e)(vi). Though non-state actors *can* commit crimes against humanity, such activity would only qualify if it is “widespread or systematic” and conducted pursuant to an organizational plan or policy. *Id.* arts. 7(1)(g), 7(2)(a).

113. For example, states parties to the Organization of Economic Cooperation and Development’s (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions agree to criminalize bribery, but bribery is defined only as payment to public officials to secure a pecuniary or other advantage. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions art. 1, Dec. 18, 1997, 37 I.L.M. 1 [hereinafter OECD Convention]. Payment to a government contractor providing services in order to secure a subcontract, for example, or some other advantage, would not clearly fall within the prohibition.

by charges of preferential treatment, overbilling, cost overruns, and waste.”¹¹⁴ Elsewhere, employees of Custer Battles, a company that was awarded two \$16 million contracts by USAID to provide security for the Baghdad airport and distribute Iraqi dinars,¹¹⁵ reportedly chartered a flight to Beirut with \$10 million in new Iraqi dinars in their luggage—which were promptly confiscated by Lebanese officials.¹¹⁶ The company also set up sham Cayman Islands subsidiaries to submit invoices, and regularly overcharged for materials—in one case charging the United States \$10 million for materials that it purchased for \$3.5 million.¹¹⁷ In short, corruption and fraud have been rampant in the Iraqi contracts. Yet, legal oversight (and democratic accountability) is limited because such contractors operate beyond many of the transparency rules that would apply to government entities.¹¹⁸

Thus, widespread privatization potentially threatens a wide variety of public law values.¹¹⁹ One response to this problem, of course, is to interpret (or amend) the international law norms themselves either to remove any state action requirement, or at any rate to construe such a requirement leniently. Indeed, at least some of the conventional state-centered story of international law that I have recounted has long been subject to challenge. For example, the U.N.’s Draft Articles on Responsibility of States for Internationally Wrongful Acts aims to make clear that the “conduct of any State organ shall be considered an act of that State under international law,” and that a person’s conduct shall be attributed to the state if he or she is acting on the state’s

114. Warren Hoge, *U.N. Criticizes Iraq Occupation Oil Sales*, N.Y. TIMES, Dec. 15, 2004, at A21. In addition, the chief contracting officer for the Army Corps of Engineers has publicly accused the Army of granting preferential treatment to KBR (through its parent company, Halliburton) in awarding contracts in Iraq and Bosnia, in violation of U.S. contracting regulations. Erik Eckholm, *A Top U.S. Contracting Official for the Army Calls for an Inquiry in the Halliburton Case*, N.Y. TIMES, Oct. 25, 2004, at A13.

115. *SDPC Hearing*, *supra* note 91, at 4.

116. *Id.* at 1-2 (statement of Alan Grayson).

117. *Id.* at 2 (statement of Alan Grayson). These allegations resulted in a private enforcement suit under the Federal False Claims Act, 31 U.S.C. § 3730 (2000). *See* Yochai J. Dreazen, *Attorney Pursues Iraq Contractor Fraud*, WALL ST. J., Apr. 19, 2006, at B1 (discussing the suit). Indeed, in March 2006 a jury ordered Custer Battles to return \$10 million in ill-gotten funds to the government. *See id.* Yet, though the district court judge in that case had permitted the suit to proceed, *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 376 F. Supp. 2d 617 (E.D. Va. 2005), it is unclear whether the verdict will ultimately hold up on appeal and whether such False Claims Act suits will be deemed sustainable in this context.

118. *See infra* text accompanying notes 129-130. As noted in note 117, *supra*, it is unclear whether or not the False Claims Act will ultimately provide an effective avenue for legal accountability.

119. To be sure, as I have argued elsewhere, these gaps may not be as significant as they first appear. *See* Dickinson, *supra* note 20. To begin with, the baseline of accountability for state actors performing foreign affairs functions is not that great. Such actors are not held accountable for violating the norms that effectuate public law values that often. Thus, the shift to private actors does not represent a dramatic decline in accountability—certainly not as great a decline as in the domestic setting, where state actors are at least sometimes held accountable for failing to uphold public law values. This comparison places the perils of privatization in perspective.

In addition, alternative avenues of legal accountability may exist under private law. As in the domestic privatization context, immunities applicable to governmental employees arguably do not apply, thereby opening up potential private law actions such as tort claims. Thus, in some ways private contractors may face a greater risk of legal liability than governmental actors.

instructions or under the state's direction.¹²⁰ Likewise, courts and tribunals have at times applied principles of state responsibility for instrumentalities to impute the liability of companies onto states.¹²¹ And some courts have suggested that certain international law norms, such as the laws of war, can be used to hold non-state actors directly accountable, at least in some circumstances.¹²² Alternatively, non-state actors can be held liable under theories of complicity or aiding and abetting.¹²³ Thus, it would be wrong to characterize international law as completely impotent with regard to private contractors.¹²⁴

Yet, though I am sympathetic to efforts to revise or interpret the norms of public international law to apply to private contractors, I argue that such efforts should not be the only response to privatization in the international realm. Indeed, public international law norms are imperfectly enforced in the best of circumstances, and any interpretational ambiguities with regard to contractors only compounds the practical difficulties. Thus, those concerned that public values may be lost in a privatized world would be well-advised to look in other directions as well. And, as we will see, the contractual relationship that creates the very structure of privatization may itself offer a means of promoting and enforcing public law values, and it is to such avenues of accountability that we now turn.

III. CONTRACT AS A TOOL TO EXTEND AND ENFORCE PUBLIC LAW VALUES

Contracts between governmental entities and the private organizations providing services can themselves serve as vehicles to promote public law values. Contractual terms can specify norms and structure the contractual relationship in ways that spur contractors to implement those norms. Thus, although typically conceived as the quintessential private law form, contracts used in this way can be a tool to "publicize" the privatization relationship.¹²⁵

120. See *supra* note 28; see also, e.g., Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT'L L. 801 (2002).

121. See *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 351-52 (D.C. Cir. 1995) (holding Iran responsible for corporation over which it exercised control); *Foremost Tehran, Inc. v. Islamic Republic of Iran*, 10 Iran-U.S. Cl. Trib. Rep. 228, 241-42 (1987) (holding the same); *Maffezini v. Kingdom of Spain (Rectification and Award)*, ICSID Case No. ARB/97/7 (Nov. 13, 2000, Jan. 31, 2001) (translation in English) (holding Spain responsible for the acts of its state entity); *Case Concerning Barcelona Traction, Light & Power Co. Ltd. (Belg. v. Spain) (Second Phase)*, 1970 I.C.J. 4, 39, P 58 (Feb. 5) ("[V]eil lifting . . . is admissible to play . . . a role in international law.").

122. See, e.g., *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on the Defense Motion on Jurisdiction, ¶ 61 (Aug. 10, 1995) (noting that war crimes include "crimes committed by any person . . . whether committed by combatants or civilians, including the nationals of neutral states"); *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995) (holding that "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals").

123. See, e.g., Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75 (2005).

124. See generally, e.g., Chia Lehnardt, *Private Military Companies and State Responsibility*, in *MARKET FORCES: REGULATING PRIVATE MILITARY COMPANIES* (Simon Chesterman & Chia Lehnardt eds., forthcoming 2007) (describing ways in which international law holds states accountable for acts of private military companies).

125. See Freeman, *supra* note 11.

Administrative law scholars have recently explored this insight in the domestic context. Most notably, Jody Freeman has suggested that states “could require compliance with both procedural and substantive standards that might otherwise be inapplicable or unenforceable against private providers.”¹²⁶ Yet this work has focused on privatization of healthcare, welfare, and prisons in the United States and has not considered privatization of military, foreign aid, and diplomatic activities. Meanwhile, as noted previously,¹²⁷ few if any international law scholars, policymakers, or NGOs have considered the possibilities of using contractual terms in the international context. Accordingly, this Part seeks to bridge the gap between domestic administrative law and international law scholarship by exploring a variety of contractual mechanisms that might be used to extend public law values to privatized foreign affairs.

Specifically, I discuss nine contracting practices that could be deployed in the foreign affairs arena: (1) incorporating public law standards in contractual terms; (2) requiring that private contractors receive training; (3) enhancing contractual monitoring, both by internal governmental actors and third parties; (4) requiring that contractors receive accreditation from independent organizations; (5) laying out clear performance benchmarks; (6) mandating contractor self-evaluation; (7) enhancing governmental termination provisions and allowing for partial governmental takeover of contracts; (8) allowing for beneficiary participation in contract design; and (9) strengthening enforcement mechanisms, including greater whistleblower protections and more opportunities for third-party beneficiary suits. In considering these possibilities, I will use Iraq as a case study, examining all of the publicly available contracts the U.S. government has negotiated to support the U.S. military or to provide for foreign aid to Iraq. Nevertheless, these same principles would apply to other types of contracts negotiated by states or international organizations with contractors providing a variety of foreign affairs functions.

The contractual mechanisms I discuss are particularly important in the foreign affairs context because many of these contracts are negotiated in secret, without competition, on a “no bid basis,” based on exceptions to the normal requirements of the Federal Acquisition Regulation (FAR).¹²⁸ For example, with respect to the U.S. government’s foreign affairs contracts in Iraq, in many cases it is impossible for the public or a watchdog group even to obtain the text of the contracts, either because government officials have kept them secret for security reasons,¹²⁹ or because the contractors have exercised what is essentially a veto, under the Freedom of Information Act (FOIA), for certain types of commercial information.¹³⁰ Problems posed by secrecy are reinforced by problems of conflict of interest because many of the contracts

126. Freeman, *supra* note 18, at 634.

127. See *supra* text accompanying notes 21-28.

128. See Megan A. Kinsey, Note, *Transparency in Government Procurement: An International Consensus?*, 34 PUB. CONT. L.J. 155, 161-62 (2004).

129. 5 U.S.C. § 552(b)(c)(1) (2000).

130. 5 U.S.C. § 552(b)(c)(4) (2000).

are awarded to firms run by former government personnel. A 2003 study by the Center for Public Integrity reports that sixty percent of the companies that received contracts in Iraq or Afghanistan “had employees or board members who either served in or had close ties to the executive branch for Republican and Democratic administrations, for members of Congress of both parties, or at the highest levels of the military.”¹³¹ Thus, it is essential that, at the very least, the contracts themselves incorporate public values.

A. *Incorporating Public Law Standards in Contractual Terms*

First, of course, the contracts could explicitly require that the contractors obey the norms that implement public law values. Specifically, the terms of each agreement could provide that private contractors must abide by relevant legal rules applicable to governmental actors. Such contractual terms would obviate the need to show that the private actors were functioning as an extension of government so as to satisfy any state action requirement that might arise under domestic and international legal regimes. Instead, the norms applicable to governmental actors would simply be part of the contractual terms, enforceable like any other provisions, regardless of state action.

In the domestic setting, such provisions are commonplace. As a term in their contracts with privately run prisons, for example, many states require compliance with constitutional, federal, state, and private standards for prison operation and inmates’ rights.¹³² In addition, contractual agreements may require contractors to provide for hearings and review of contractor actions.¹³³

The U.S. government’s military and foreign aid contracts in Iraq, by contrast, are woefully inadequate on this score. To be sure, a 2005 Department of Defense (DOD) document providing general instructions regarding contracting practices does state that contractors “shall abide by applicable laws, regulations, DoD policy, and international agreements....”¹³⁴ Yet, of the sixty publicly available Iraq contracts,¹³⁵ none contains specific provisions requiring contractors to obey human rights, anticorruption, or transparency

131. See CENTER FOR PUBLIC INTEGRITY, WINNING CONTRACTORS: U.S. CONTRACTORS REAP THE WINDFALLS OF POST-WAR RECONSTRUCTION (2003), available at <http://www.publicintegrity.org/wow/printer-friendly.aspx?aid=65> [hereinafter WINNING CONTRACTORS].

132. For example, under the model contract for private prison management drafted by the Oklahoma Department of Corrections, contractors must comply with constitutional, federal, state, and private standards, including those established by the American Correctional Association. See Okla. Dep’t of Corr., Correctional Services Contract, art. 1, available at <http://www.doc.state.ok.us/Private%20Prisons/98cnta.pdf> [hereinafter Oklahoma Contract]. Other states’ contracts with companies that manage private prisons contain similar provisions. See, e.g., Fla. Corr. Privatization Comm’n, Correctional Services Contract with Corrections Corp. of America, § 5.1 [hereinafter Florida Contract]; Freeman, *supra* note 18, at 634 (citing Texas Department of Criminal Justice model contract); see also J. Michael Keating, Jr., *Public over Private: Monitoring the Performance of Privately Operated Prisons and Jails*, in PRIVATE PRISONS AND THE PUBLIC INTEREST 130, 138-41 (Douglas C. MacDonald ed., 1990).

133. See Freeman, *supra* note 18, at 608 (discussing contractual hearing and oversight mechanisms in the nursing home context).

134. Dep’t of Defense Instruction, No. 3020.41, § 6.1 (Oct. 3, 2005).

135. See Center for Public Integrity, Contracts and Reports, <http://www.publicintegrity.org/wow/resources.aspx?act=resources> (last visited Aug. 18, 2005) [hereinafter Contracts and Reports] (providing text of contracts).

norms. The agreements between the U.S. government and CACI to supply military interrogators starkly illustrate this point. The intelligence personnel were hired pursuant to a standing “blanket purchase agreement” between the Department of the Interior and CACI, negotiated in 2000.¹³⁶ Under such an agreement the procuring agency need not request specific services at the time the agreement is made but rather may enter task orders as the need arises. In 2003, eleven task orders, worth \$66.2 million were entered (none of which was the result of competitive bidding).¹³⁷ The orders specify only that CACI would provide interrogation support and analysis work for the U.S. Army in Iraq, including “debriefing of personnel, intelligence report writing, and screening/interrogation of detainees at established holding areas.”¹³⁸ Significantly, the orders do not expressly require that the private contractor interrogators comply with international human rights or humanitarian law rules such as those contained in the Torture Convention or the Geneva Conventions. Likewise, although the contractors are subject to international and domestic laws prohibiting the bribery of government officials,¹³⁹ as well as the general terms of the FAR,¹⁴⁰ none of the contracts specifically prohibits the contractors themselves from accepting bribes, an area that remains ambiguous in domestic and international law. Similarly, the contracts do not provide terms specifying the applicability of FOIA, which would help make contractor activities more transparent.

B. *Requiring that Private Contractors Receive Training*

Foreign affairs contracts could also explicitly require that contractors receive training in activities that would promote public law values. Such training, as a contractual requirement, could help instill in contractor employees a sense of the importance of these values. At the same time, training could provide employees with concrete recommendations about how to implement these values in specific, challenging situations.

Again, in the domestic setting such training provisions are commonplace. A standard term in state agreements with companies that manage private prisons, for example, requires companies to certify that the training they provide to personnel is comparable to that offered to state employees.¹⁴¹ Such training would normally include instruction concerning legal limits on the use of force and examples of what those limits mean in circumstances likely to arise in the prison setting.

136. See Agreement Between the Department of the Interior and CACI Premier Technology, Inc., No. NBCHA010005 (2000) [hereinafter DOI-CACI].

137. Work Orders Nos. 000035D004, 000036D004, 000037D004, 000038D0004, 000064D004, 000067D004, 000070D004, 000071D004, 000072D004, 000073D004, & 000080D004, issued under DOI-CACI, *supra* note 136, available at http://www.publicintegrity.org/wow/docs/CACI_ordersAll.pdf.

138. Work Order No. 000071/0001, *supra* note 137.

139. See, e.g., OECD Convention, *supra* note 113; False Claims Act, 31 U.S.C. § 3729 (2000).

140. 48 C.F.R. §§ 2.000 (2006).

141. See, e.g., Oklahoma Contract, *supra* note 132, § 6.4; Florida Contract, *supra* note 132, § 6.5; Freeman, *supra* note 18, at 634 (describing model contract for private prison management drafted by the Texas Department of Criminal Justice).

Yet, while the 2005 DOD instructions require documentation of training concerning appropriate use of force,¹⁴² none of the publicly available Iraq contracts appears to require such training. Indeed, although a few of the agreements require that contractors hire employees with a certain number of years' experience,¹⁴³ none specifies that the contractor must provide any particular training at all. For example, the U.S. government's agreement with Chugach McKinley, Inc. to screen and hire a broad range of military support personnel—from doctors to “special mission advisers”—says nothing about whether such personnel will receive training in applicable international law standards, even though such personnel may be in a position to commit abuses.¹⁴⁴ The U.S. government's agreements with CACI to provide interrogators are likewise completely silent on whether interrogators will receive education in international humanitarian and human rights law, training that U.S. military interrogators would normally receive.¹⁴⁵ Not surprisingly then, an Army Inspector General report on the conditions that led to the Abu Ghraib scandal concluded that 35% of CACI's Iraqi interrogators did not even have any “formal training in military interrogation policies and techniques,” let alone training in international law norms.¹⁴⁶ This omission is particularly glaring given the highly volatile Iraqi environment.

Anti-corruption training would also be useful for foreign affairs contractors generally, and for contracts in Iraq specifically. Iraq ranks among the worst countries in the world on Transparency International's corruption index,¹⁴⁷ and it is no surprise that such corruption reaches U.S. contractors operating there. Indeed, one former Coalition Provisional Authority (CPA) official, Alan Grayson, has asserted that lack of employee screening and training led to the shocking abuses committed by Custer Battles.¹⁴⁸ Yet such contracts say nothing about training for contractors in practices to avoid corruption. And while training requirements undoubtedly would increase the cost of the contracts, the fraud and waste that could be deterred with better training might well offset such increases.

142. Dep't of Defense Instruction, *supra* note 134, § 6.3.5.3.4.

143. *See, e.g.*, Work Order No. 000071/0001, *supra* note 137 (statement of work) (requiring that human intelligence advisor must have at least “10 years of experience” and must be “knowledgeable of Army/Joint Interrogation procedures”). Notably, this work order does not require the contractor to provide any training. *See id.*

144. *See* Agreement between USDOD and Chugach McKinley, Inc., Professional Skills, No. DASW01-03-D-0025 (July 3, 2003), *available at* <http://www.publicintegrity.org/docs/wow/ChugachMcKinley-Iraq.pdf>.

145. *Id.*

146. DEP'T OF THE ARMY, INSPECTOR GEN., DETAINEE OPERATIONS INSPECTION 87-89 (2004), *available at* <http://www4.army.mil/ocpa/reports/ArmyIGDetaineeAbuse/DAIG%20Detainee%20Operations%20Inspection%20Report.pdf>.

147. Out of 145 countries (with 145 as the worst), Iraq ranks 129th. TRANSPARENCY INTERNATIONAL, CORRUPTION PRACTICES INDEX 2004, *available at* http://www.transparency.org/pressreleases_archive/2004/2004.10.20.cpi.en.html.

148. *See supra* text accompanying notes 115–118.

C. *Enhancing Contractual Monitoring, Both by Internal Governmental Actors and by Third Parties*

Provisions could also be made for increased contract monitoring, which could provide an important check on abuses. Such monitoring should include, to begin with, sufficient numbers of trained and experienced governmental contract monitors. At the same time, governmental ombudspersons—leaders of independent offices charged with providing enhanced oversight—serve as an important supplement to the contract monitors. Thus, at a minimum, it is essential that government agencies devote enough resources to ensure that these requirements are implemented in a meaningful way. In addition, outside independent non-governmental organizations, both for-profit and non-profit, can serve an important function by monitoring contracts.

Contracts for services in the domestic context regularly include this three-tiered monitoring structure: government personnel assigned as contract monitors, supplemented by agency actors such as ombudspersons, further supplemented by independent outside groups. In the privatized health care context, for example, where private nursing homes receive Medicaid funding and private hospitals receive Medicare and Medicaid support, the trend is toward agreements that require a state-appointed contract manager.¹⁴⁹ Federal agencies such as the Department of Health and Human Services (whose Inspector General issues reports on contracts with private hospitals that receive public funding¹⁵⁰) and the Health Care Financing Administration (which exerts fairly tight control over private nursing homes receiving Medicaid funding¹⁵¹) also have significant oversight authority. In addition, third-party independent organizations play an important role. For example, the Joint Commission on Health Care and Accreditation of Health Organizations (JCAHO), a private organization of professional associations, certifies health care institutions for compliance with federal regulations and state licensure laws.¹⁵²

Foreign affairs contracts currently provide for far less monitoring. To be sure, the statutory and regulatory scheme includes provisions for governmental contract monitors, supplemented by inspectors general of the respective agencies responsible for the contracts,¹⁵³ as well as for auditing of

149. Freeman, *supra* note 18, at 608-09.

150. See OFFICE OF INSPECTOR GEN., DEP'T OF HEALTH AND HUMAN SERVS., THE EXTERNAL REVIEW OF HOSPITAL QUALITY: A CALL FOR GREATER ACCOUNTABILITY 1-2 (1999), *available at* <http://oig.hhs.gov/oei/reports/oei-01-97-00050.pdf>; see also OFFICE OF INSPECTOR GEN., DEP'T OF HEALTH AND HUMAN SERVS., THE EXTERNAL REVIEW OF HOSPITAL QUALITY: THE ROLE OF ACCREDITATION 6-7 (1999), *available at* <http://oig.hhs.gov/oei/reports/oei-01-97-00051.pdf> [hereinafter OFFICE OF INSPECTOR GEN., ACCREDITATION] (detailing lack of accountability and quality oversight in accredited hospitals).

151. See, e.g., U.S. DEPT. OF HEALTH AND HUMAN SERVS., NURSING HOME COMPARE, <http://www.medicare.gov/NHCompare/Home.asp> (last modified Sept. 1, 2005) (database includes information on nursing homes certified by Medicare or Medicaid).

152. See Eleanor D. Kinney, *Private Accreditation as a Substitute for Direct Government Regulation in Public Health Insurance Programs: When Is It Appropriate?*, 57 LAW & CONTEMP. PROBS. 47, 52 (1994).

153. Inspector General oversight arises from the Inspector General (IG) Act, codified as amended at 5 U.S.C. app. 3, §§ 1-12 (1994). "The IG Act authorized the creation of offices whose

contracts by independent private accounting firms.¹⁵⁴ Yet, the work of these monitors focuses primarily on whether the contractors are keeping adequate accounts and refraining from fraud and bribery. Contracts say little about human rights norms, and governmental contract monitors and ombudspersons are not ordinarily focused on these values when scrutinizing contractors.¹⁵⁵ To the extent that independent third-party groups are empowered to monitor under the contract, they tend to be auditing firms, whose expertise lies in financial matters, not in international human rights or humanitarian law. Foreign affairs contracts rarely, if ever, provide for monitoring by independent groups with expertise in this area.¹⁵⁶

Moreover, in practice, foreign affairs contracts tend to escape even this limited oversight. This is because many of the monitoring requirements tend not to apply in emergency situations, which are, of course, precisely the occasions when military intervention or humanitarian relief efforts and post-reconstruction aid are most likely. Thus, ordinary contracting procedures, such as competitive bidding, are often waived.¹⁵⁷ In addition, many of the contracts are written as cost reimbursement contracts, often termed “cost-plus” agreements, under which the government reimburses the contractor for costs incurred in providing a service, plus a fee that is calculated as a percentage of the cost.¹⁵⁸ Though often criticized as leading to waste and abuse,¹⁵⁹ such contracts become the norm in emergency situations, rather than the exception. At the same time, too few contract monitors are appointed, those who are

mission is to detect and prevent fraud, waste, and abuse in their respective departments and agencies across the executive branch.” Michael R. Bromwich, *Running Special Investigations: The Inspector General Model*, 86 GEO. L.J. 2027, 2027 (1998). For an analysis of the role that inspectors general play in various agencies, see *id.*

154. See USAID, OFF. OF INSPECTOR GEN., SEMIANNUAL REPORT 13 (2004), available at <http://www.usaid.gov/oig/public/semiann/sarc0409.pdf>.

155. After a scandal, however, such as the uproar surrounding revelations of abuse at Abu Ghraib prison, ombudspersons may be enlisted to investigate such problems.

156. A model for this type of oversight might be the role that the International Committee on the Red Cross (ICRC) currently plays in monitoring the conduct of governmental actors during armed conflict. The Geneva Conventions require states parties to allow ICRC representatives to visit military detention centers to ensure that detainees are treated in accord with the principles of international human rights and humanitarian law. Geneva Convention Relative to the Treatment of Prisoners of War art. 126, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Fourth Geneva Convention, *supra* note 98, arts. 76, 143. Yet, it is at best ambiguous whether the ICRC would be empowered to play a similar role with respect to private security contractors. The contracts could make this role explicit.

157. In practice, one way these requirements are avoided is through the use of blanket purchase order agreements, in which task orders can be issued under pre-existing contracts. See WINNING CONTRACTORS, *supra* note 131, and accompanying text. For criticism of the lack of open bidding on the Iraq contracts, see CENTER FOR RESPONSIVE POLITICS, REBUILDING IRAQ—THE CONTRACTORS, available at http://www.opensecrets.org/news/rebuilding_iraq/index.asp. For an opposing view, see Jeffrey Marburg-Goodman, *USAID’s Procurement Contracts: Insider’s View*, 39 PROCUREMENT LAW 10 (2003).

158. Federal Acquisition Regulation, 48 C.F.R. §§ 16.301-16.307 (2006).

159. Under the cost-plus system, companies have an incentive to inflate the costs of services so that their fee, typically measured as a percentage of this cost, is as high as possible, see Laura Peterson, *Outsourcing Government: Service Contracting Has Risen Dramatically in the Last Decade*, CTR. FOR PUB. INTEGRITY, Oct. 30, 2003, available at <http://www.publicintegrity.org/wow/report.aspx?aid=68> [hereinafter *Outsourcing Government*], although such contracts do contain a cost ceiling that cannot be exceeded without the contracting officer’s approval. 48 C.F.R. § 16.301-1 (2005). Under the Federal Acquisition Regulations (FAR), these contracts can only be utilized when costs cannot be estimated with sufficient accuracy. *Id.* § 16.301-2.

appointed lack expertise, and ombudspersons are not given the resources they need to do an effective job.

The monitoring of the Iraq contracts, or virtual lack thereof, provides a salient example. The government agencies with responsibility for the contracts—primarily USAID, the DOD, and the now dismantled Coalition Provisional Authority—devoted extraordinarily minimal resources to monitoring.¹⁶⁰ For example, USAID has responsibility for approximately \$3 billion in reconstruction projects,¹⁶¹ but the agency had only four contract monitoring personnel on the ground as of March 2003.¹⁶² In fact, due to the difficulties of monitoring contracts with so little staff, USAID determined to contract out the monitoring function itself!¹⁶³ Likewise, a recent DOD Inspector General study concluded that more than half of the Iraq contracts had not been adequately monitored.¹⁶⁴ This fact is not surprising given that DOD's acquisition workforce was reduced by more than half between 1990 and 2001, while the department's contracting workload increased by more than twelve percent.¹⁶⁵ In addition, those who were assigned to monitor contract performance were often inadequately trained.¹⁶⁶ Finally, in an ironic twist, private contractors themselves are often hired to write the procedural rules governing contracting rules and monitoring protocols, thus leading to further conflict-of-interest problems. Indeed, the DOD handbook on the contracting process was drafted by one of its principal military contractors.¹⁶⁷

The CPA was plagued with similar problems. A recent report notes that the CPA hadn't kept accounts for the hundreds of millions of dollars of cash in its vault, had awarded contracts worth billions of dollars to American firms without tender, and had no idea what was happening to the money from the Development Fund for Iraq (DFI) which was being spent by the interim Iraqi government ministries.¹⁶⁸

One former CPA official has observed that, as a result of poor oversight, "contracts were made that were mistakes, and were poorly, if at all, supervised [and] money was spent that could have been saved, if we simply had the right numbers of people."¹⁶⁹ For example, even devoting a single staff person to the

160. For a searing indictment of the government's failure to oversee military contractors and that failure's role in the Abu Ghraib atrocities, see Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STAN. L. & POL'Y REV. 549 (2005).

161. See ACQUISITION AND ASSISTANCE, *supra* note 65.

162. See Shane Harris, *AID Plans To Contract Out Oversight of Iraq Contracts*, GOVEXEC.COM, May 20, 2003, <http://www.govexec.com/dailyfed/0503/052003h1.htm>.

163. See *id.*

164. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF DEFENSE, ACQUISITIONS: CONTRACTS AWARDED FOR THE COALITION PROVISIONAL AUTHORITY BY THE DEFENSE CONTRACTING COMMAND-WASHINGTON, REP. NO. D-2004-057, at 24 (2004).

165. COMPTROLLER GEN., U.S. GEN. ACCOUNTING OFFICE, SOURCING AND ACQUISITION, REP. NO. GAO-03-771R, at 1 (2003); see also *Outsourcing Government*, *supra* note 159. For a detailed discussion of the depletion of the acquisition workforce, see David A. Whiteford, *Negotiated Procurements: Squandering the Benefit of the Bargain*, 32 PUB. CONT. L.J. 509, 555-57 (2003).

166. *Id.*

167. See SINGER, *supra* note 13, at 123-24.

168. Ed Harriman, *Where Has All the Money Gone?*, LONDON REV. OF BOOKS, July 7, 2005, at 4, 5.

169. SDPC Hearing, *supra* note 91, at 4.

two \$16 million Custer Battles contracts that gave rise to multiple instances of fraud and abuse¹⁷⁰ would have saved at least \$4 million.¹⁷¹

Finally, the dispersal of authority to issue foreign affairs contracts across multiple agencies creates interagency communication problems and conflicts of interest that impede oversight.¹⁷² For example, officials at different agencies use different methods to calculate the costs of contracts, and these methods may also vary from those used by the companies themselves.¹⁷³ In addition, because agencies can earn fees for facilitating other agencies' contracts but are not adequately held to account for monitoring those contracts, agencies have incentives to sponsor other agencies' contracts but little incentive to supervise them.¹⁷⁴ These arrangements can lead to abuse, as occurred in the case of the Department of the Interior sponsorship of DOD's task orders for intelligence services at Abu Ghraib prison under an existing contract between CACI and the Interior Department.¹⁷⁵

In short, the foreign affairs contracts could provide far better protections for public law values through greater monitoring. Although the statutory and regulatory regime contemplates a combination of supervision by contract monitors, independent agency oversight through inspectors general, and limited financial auditing by third-party entities, these provisions have not worked well in practice due to insufficient staffing and resources, combined with the large number of contracts. To be sure, statutory and regulatory reforms could address these problems. But, alternatively, the contracts themselves could remedy these deficiencies to some extent, by specifying greater numbers of monitors and requiring that they possess a certain degree of training, as well as by allowing for independent oversight by third-party groups such as the International Committee of the Red Cross (ICRC).

D. *Laying Out Clear Performance Benchmarks*

Of course, to some degree increased contract monitoring can only be effective to the extent that the contracts have clear benchmarks against which to measure compliance. In the domestic context, commentators and policymakers have long urged that contracts include benchmarks, and rigorous performance standards regularly appear in contracts.¹⁷⁶ Scholars have argued that, ideally, performance-based contracts should "clearly spell out the desired

170. See *supra* text accompanying notes 115-117.

171. See generally *SDPC Hearing*, *supra* note 91, at 24 (statement of Franklin Willis). Of course, the lack of oversight may have a more cynical explanation: it permits private contractors (who may have powerful connections within government) to reap profits without significant constraints.

172. The DOD has taken more and more control over reconstruction and emergency relief functions, normally the province of USAID. See *Contracts and Reports*, *supra* note 135. The State Department, meanwhile, manages the contract with DynCorp to provide Iraqi police training. *Id.* And the State Department's Bureau of Population, Refugees, and Migration (PRM) manages refugee assistance funds.

173. *WINNING CONTRACTORS*, *supra* note 131.

174. Schooner, *supra* note 160, at 564-70.

175. *Id.*

176. See, e.g., HARRY P. HATRY, URBAN INST., *PERFORMANCE MEASUREMENT: GETTING RESULTS* 3-10 (1999).

end result” but leave the choice of method to the contractor, who should have “as much freedom as possible in figuring out how to best meet government’s performance objective.”¹⁷⁷

These ideas have been implemented most notably in contracts with private prisons. For example, under the model contract for private prison management drafted by the Oklahoma Department of Corrections, contractors must meet such delineated standards for security, meals, and education.¹⁷⁸ They must also certify that the training provided to personnel is comparable to that offered to state employees.¹⁷⁹ In Texas, contractors must abide by similar terms and, in addition, must “establish performance measures for rehabilitative programs.”¹⁸⁰ In addition, the American Correctional Association is revising its accreditation standards to include performance measures, and the Office of Juvenile Justice and Delinquency Prevention is developing performance-based standards for juvenile correctional facilities.¹⁸¹ Commentators have noted, further, that performance measures for private prison operators could include both

process measures such as the number of educational or vocational programs, or outcome measures such as the Logan quality of confinement index, the number of assaults, or the recidivism rate. . . . Because no single statistic adequately captures ‘quality,’ and because focusing on any single measure could have perverse effects, performance-based contracts should tie compensation to a large and rich set of variables.¹⁸²

Privatized welfare programs have also experimented with performance measures as a means to improve quality. In 1996, Congress authorized the implementation of welfare programs “through contracts with charitable, religious, or private organizations.”¹⁸³ Since then, states have increasingly contracted with such organizations,¹⁸⁴ and many of these contracts contain performance benchmarks and output requirements.¹⁸⁵ For example, under a performance-based system, a welfare contractor might receive financial

177. WILLIAM D. EGGERS, PERFORMANCE-BASED CONTRACTING: DESIGNING STATE-OF-THE-ART CONTRACT ADMINISTRATION AND MONITORING SYSTEMS 2 (1997).

178. See, e.g., Oklahoma Contract, *supra* note 132, § 5.

179. *Id.* §§ 6.3-6.4.

180. See Freeman, *supra* note 18, at 634-35 (describing contract between private corporation and state of Texas).

181. See Performance Standards Home: Performance-Based Standards for Juvenile Correction and Detention Facilities, <http://www.pbstandards.org>; see also 1 Geoffrey F. Segal & Adrian T. Moore, *Weighing the Watchmen: Evaluating the Costs and Benefits of Outsourcing Correctional Services* 15-16 (Policy Study 290, 2002).

182. *A Tale of Two Systems: Cost, Quality, and Accountability in Private Prisons*, 115 HARV. L. REV. 1868, 1889-90 (2002) [hereinafter *Tale of Two Systems*].

183. 42 U.S.C. § 604a(a)(1)(A) (2000).

184. See Winston, *supra* note 4.

185. See M. BRYNA SANGER, THE WELFARE MARKETPLACE: PRIVATIZATION AND WELFARE REFORM 28-48 (2003) (discussing issues raised by performance contracting for welfare services); Sheena McConnell et al., *Privatization in Practice: Case Studies of Contracting for TANF Case Management* 39-51 (Mathematica Policy Research, Inc., Reference No. 8834-008, 2003), available at <http://www.mathematica-mpr.com/PDFs/privatize.pdf> (discussing use of performance measures in welfare contracts).

rewards for increasing the percentage of program participants who receive job placements.¹⁸⁶

The foreign affairs contracts are notably less rigorous in providing for performance measures. Although military service contracts are difficult to evaluate because so many of them are not publicly available, contract officers familiar with the contracts have remarked on their generally vague terms.¹⁸⁷ And the fact that they are often indefinite delivery/indefinite quantity (ID/IQ) contracts adds to their open-ended quality.¹⁸⁸ Under this structure, the government awards a contract that does not specify how many services or goods will be necessary or the dates upon which they will be required.¹⁸⁹ These additional details are specified in subsequent task orders, which themselves are often vague because the task orders need not pass through the same degree of supervision as the initial contract award.¹⁹⁰ Of course, such contracts may sometimes be necessary, because the government cannot know in advance precisely what will be required or for how long.¹⁹¹ Yet the lack of any administrable standards in these contracts can lead to significant abuses.¹⁹²

Of the publicly available Iraq contracts for military services, it is striking that none contains clear benchmarks or output requirements. Instead, they are phrased in amorphous language that provides little opportunity for compliance evaluation. For example, a contract between the U.S. government and MPRI to provide translators for government personnel, including interrogators, simply provides that the contractors will supply interpreters.¹⁹³ The agreement says nothing about whether the interpreters must be effective or how effectiveness might be measured.¹⁹⁴ Similarly, the CACI task orders for interrogators specify only that CACI will provide interrogation support and analysis work for the U.S. Army in Iraq, including “debriefing of personnel, intelligence report writing, and screening/interrogation of detainees at established holding areas.”¹⁹⁵ Other than these broad goals, the task orders say little more. To be sure, security concerns may require some degree of vagueness. Nonetheless, the task orders could be much more specific about training requirements, standards of conduct, supervision, and performance parameters.

Turning to the foreign aid context, agencies tend to promote the use of results-based agreements, under which contractors must demonstrate specific,

186. See Metzger, *supra* note 7, at 1387-88.

187. See, e.g., *SDPC Hearing*, *supra* note 91, at 3-4 (prepared statement of Franklin Willis).

188. For example, the CACI agreement was an ID/IQ contract. Cf. Schooner, *supra* note 160, at 569 (using the “Abu Ghraib experience” as an illustration of the dangers of ID/IQ contracts).

189. ID/IQ contracts are governed by 48 C.F.R. § 16.500-6 (2005). For a discussion of ID/IQ contracts, see Karen DaPonte Thornton, *Fine-Tuning Acquisition Reform’s Favorite Procurement Vehicle, the Indefinite Delivery Contract*, 31 PUB. CONT. L.J. 383 (2002).

190. See 48 C.F.R. § 16.504 (2005); see also Schooner, *supra* note 160, at 565.

191. See Thornton, *supra* note 189, at 387.

192. See, e.g., Schooner, *supra* note 160, at 563.

193. Agreement Between DOD and MPRI, Iraq Interpreters, No. GS-23F-9814H (Apr. 28, 2003), available at http://www.publicintegrity.org/docs/wow/MPRI_Linguists.pdf.

194. *Id.*

195. Work Order No. 000071D004, *supra* note 137, at 6.

tangible results that are to be evaluated by the agency.¹⁹⁶ Yet in practice many such agreements do not actually contain any results-based requirements, often because the aid, particularly in emergency relief settings, is provided on an expedited basis to organizations with very small staffs. With regard to Iraq, for example, a review of the publicly available USAID agreements reveals that only a few set forth specific performance benchmarks or requirements.¹⁹⁷

To be sure, performance benchmarks that are too strict can pose problems. As scholars of domestic privatization have noted, discretion can serve useful goals; indeed, discretion is in part what makes privatization desirable, as private contractors have more flexibility than rulebound bureaucratic actors to pursue innovative approaches.¹⁹⁸ Output requirements that preserve flexibility about the means to achieve those results are therefore the most effective.¹⁹⁹ But even carefully tailored output requirements can go awry, as when, for example, private welfare providers “cream” those accepted into their programs in order to increase the percentage of those who receive job placements.²⁰⁰ Moreover, output requirements can sometimes give contractors tunnel vision, leading them to focus only on the benchmarks, thereby missing opportunities to achieve wider benefits. A recent study of the enhanced “auditing” that accompanied privatization in Thatcherite Britain, for example, suggests that narrow output requirements steered organizations and individuals away from broader, more diffuse, social goals.²⁰¹

196. See, e.g., Judith Tendler, *Turning Private Voluntary Organizations into Development Agencies: Questions for Evaluation* (127.49 AIG Program Evaluation Discussion Paper No. 12, 1982) (making recommendations regarding USAID’s evaluation process for contracted projects).

197. See Agreement Between USAID and Bechtel National, Inc., Iraq Infrastructure Reconstruction—Phase II, No. SPU-C-00-04-00001-00 (Jan. 4, 2004), available at <http://www.usaid.gov/iraq/contracts/iirii.html>; Agreement Between USAID and Bearing Point Inc., Economic Recovery, Reform, and Sustained Growth, No. RAN-C-00-03-00043-00 (July 25, 2003), available at <http://www.usaid.gov/iraq/contracts/errsgi.html>; Agreement Between USAID and Skylink Air and Logistic Support (USA), Inc., Airport Administration, No. DFD-C-00-03-00026-00 (May 5, 2003), available at <http://www.usaid.gov/iraq/contracts/aa.html>; Agreement Between USAID and Abt Associates, Inc., Public Health, No. RAN-C-00-03-0001-00 (Apr. 30, 2003), available at <http://www.usaid.gov/iraq/contracts/ph.html>; Agreement Between USAID and Bechtel, Inc., Capital Construction, No. EEE-C-00-03-00018-00 (Apr. 17, 2003), available at <http://www.usaid.gov/iraq/contracts/cc.html>; Agreement Between USAID and Creative Associates International, Inc., Primary and Secondary Education, No. EDG-C-00-03-00011-00 (Apr. 11, 2003), available at <http://www.usaid.gov/iraq/contracts/pse.html>; Agreement Between USAID and Research Triangle Institute, Local Governance, No. EDG-C-00-03-00010-00 (Apr. 11, 2003), available at <http://www.usaid.gov/iraq/contracts/lg.html>.

198. See, e.g., Nestor Davidson, *Relational Contracts in the Privatization of Social Welfare: The Case of Housing*, 24 YALE L. & POL’Y REV. (forthcoming 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=887398 (arguing for a “relational” approach to contracting that “shifts the locus of efficiency and accountability efforts from contractual specificity and enforcement to encouraging flexibility and fostering mutual responsibility for program goals”); Metzger, *supra* note 7, at 1388 (“[T]he operational flexibility of private providers can make them better able to improve staff performance and tailor their programs to meet the needs of particular participants of employers.”); Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1262 (2003) (“Rigid standards could force private providers to behave like government and lose their potential for innovation, efficiency, and flexibility.”).

199. See EGGERS, *supra* note 177, at 2.

200. See Sanger, *supra* note 185, at 21-22, 42-43, 68-69, 104-06.

201. See generally MICHAEL POWER, *THE AUDIT SOCIETY: RITUALS OF VERIFICATION* (1999).

In addition, by their very nature, results-based contracts raise difficult questions about how best to measure output. Creating benchmarks may be relatively straight-forward if the project at issue involves simply building a bridge or dam, but it is very difficult to measure intangibles, such as fostering human development or building civil society.²⁰² Likewise, short-term results, such as whether food aid was delivered, are much easier to measure than longer-term systemic efforts to alleviate poverty, provide education, and so on. As a consequence, results-based contracts tend to put more emphasis on short-term delivery of services rather than longer-term impact.²⁰³ Finally, contractual output requirements do not, of course, necessarily ensure compliance because contractors may simply fail to meet their goals. In addition, even the most detailed performance requirements and standards inevitably leave considerable discretion to the contractor.²⁰⁴

Nonetheless, despite problems with overly rigid performance benchmarks, the foreign affairs contracts (at least those that are publicly available) appear to fall at the opposite end of the spectrum. Indeed, they possess so few benchmarks and output requirements that they contain no meaningful evaluative criteria whatsoever. In such circumstances, enhanced performance benchmarks could be a useful contractual tool.

E. *Requiring that Contractors Receive Accreditation from Independent Organizations*

Another contract-based tool for promoting public law values is accreditation. Independent organizations, often consisting of experts or professionals in the field, can evaluate and rate private contractors. These ratings can then be used in the contracting process because agreements can require that contractors receive certain rankings. Or, governmental entities or international institutions, such as the United Nations, could develop accreditation regimes.

Again, the domestic context offers a particularly rich set of examples that could provide useful lessons in the foreign affairs setting. For example, in the field of publicly funded, privately provided health care, JCAHO accredits hospitals receiving Medicare and Medicaid funding. Indeed, such accreditation is required by statute as well as by contract.²⁰⁵ State laws or contractual terms also often specify that health maintenance organizations must receive accreditation by the National Committee for Quality Assurance (NCQA), an independent non-profit organization, before receiving public funding.²⁰⁶ Until recently, NCQA certification was primarily voluntary,

202. See Smillie, *supra* note 16, at 10.

203. *Id.* at 10-11.

204. See, e.g., *supra* note 198 and accompanying text (discussing important benefits of discretion).

205. See Kinney, *supra* note 152, at 52.

206. Although NCQA's accreditation program is voluntary, almost half the HMOs in the nation, covering three quarters of all HMO enrollees, are currently involved in the NCQA Accreditation process. Significantly, employers increasingly require or request NCQA accreditation of the plans with

offering health maintenance organizations an advantage when competing for lucrative health care delivery contracts. When states became managed care purchasers, however, they adopted NCQA as a benchmark of quality.²⁰⁷

Similarly, many contracts with private prison operators require companies to receive accreditation by the American Correctional Association (ACA).²⁰⁸ An organization of correctional professionals that has existed for over a century, the ACA accredits prisons and provides training for prison personnel while also setting standards that apply to virtually every aspect of prison operation.²⁰⁹ Not only has ACA accreditation become a standard contract requirement,²¹⁰ but federal courts have used ACA standards to interpret constitutional and statutory provisions.²¹¹ Even private investors look to accreditation as an indication of quality.²¹² Thus, the accreditation requirement creates significant compliance incentives.

Privatized education regimes such as charter schools have also considered accreditation by independent organizations as a means of ensuring quality.²¹³ The focus of many independent organizations on facilities and administrative processes over underlying educational quality has led some critics to charge that educational accreditation is relatively ineffective.²¹⁴ Nonetheless, commentators have advocated improved accreditation procedures and greater use of such accreditation to promote public law values.²¹⁵

Indeed, domestic administrative law scholars have noted that these independent, private accrediting entities are effectively setting the standards that give meaning to public law values.²¹⁶ In that regard, the relative insularity

which they do business. See National Comm. for Quality Assurance, NCQA: Overview, <http://www.ncqa.org/Communications/Publications/overviewncqa.pdf> (last visited Mar. 30, 2006).

207. Freeman, *supra* note 18, at 618-19; see also J. Robert Lilly & Paul Knepper, *The Corrections-Commercial Complex*, 39 CRIME & DELINQ. 150, 156-57 (1993).

208. See, e.g., Oklahoma Contract, *supra* note 132; Freeman, *supra* note 18, at 634 (describing model contract for private prison management drafted by the Texas Department of Criminal Justice that contains such a requirement).

209. See Freeman, *supra* note 18, at 628-29. Freeman notes that, "throughout its history, the ACA has fostered professionalism in prison administration through the development of standards and promoted progressive reforms such as rehabilitation." *Id.*

210. See, e.g., Florida Contract, *supra* note 132, § 5.21 (requiring prison to maintain accreditation); Oklahoma Contract, *supra* note 132, § 5.2.

211. See MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 162-64 (1998).

212. Freeman, *supra* note 18, at 629.

213. See Isabel V. Sawhill & Shannon L. Smith, *Vouchers for Elementary and Secondary Education*, in VOUCHERS AND THE PROVISION OF PUBLIC SERVICES 263 (C. Eugene Steuerle et. al. eds., 2000).

214. See *Accreditation: What Does It Mean?*, PARENT POWER!, Dec. 2000, at 2-3, available at http://www.edreform.com/_upload/00dec.pdf#ppArt75.

215. Stephen D. Sugarman & Emlei M. Kuboyama, *Approving Charter Schools: The Gate-Keeper Function*, 53 ADMIN. L. REV. 869, 937 (2001).

216. As Freeman observes, in the prison context, "the ACA, rather than government agencies, may effectively establish correctional standards." Freeman, *supra* note 18, at 629. Other private organizations—such as the American Medical Association, the National Sheriffs' Association, the American Public Health Association, and the National Fire Protection Association, all of which have published guidelines or standards governing "such things as medical care, sanitation, and safety in prisons"—play a similar role. *Id.* In the health care context, the Joint Commission on Healthcare and Accreditation also develops industry standards, through "a committee that includes representatives of

of the standard-setting and accreditation process may undermine the ability of broader groups, including consumers and the public at large, to participate in the process.²¹⁷ There is also the concern that private accreditors in some cases might be too close to the contractors, and therefore too lenient.²¹⁸ Nevertheless, even critics agree that the standards are often much better than those that would be developed by agency bureaucrats, and despite the imperfections, accreditation has served as an important check on the contracting process.²¹⁹

In contrast, accreditation is glaringly absent in the foreign affairs context.²²⁰ Human rights organizations, governments, and the United Nations have begun to encourage corporations, particularly those in the extraction industries, to comply with voluntary labor, environmental, and human rights standards.²²¹ A consortium of NGOs that deliver humanitarian relief have initiated the SPHERE project, which is an effort to set standards for the provision of humanitarian aid, including specific guidelines for field operations, training, and self evaluation.²²² And an industry-founded association of private security companies, the International Peace Officers Association (IPOA), has begun to construct a comprehensive code of conduct that includes human rights standards.²²³ Nevertheless, neither the U.N., nor domestic governments, nor outside groups concerned with potential abuses by foreign affairs contractors have so far undertaken serious efforts either to harness these nascent accreditation initiatives or to promote other accreditation projects.

This failure is particularly striking in the Iraq context. Not one of the available contracts for aid or military services requires that the entities

professional and industry groups, as well as government representatives from” the Health Care Financing Administration. *Id.* at 610-12.

217. *Id.* at 612-13; *see also* Kinney, *supra* note 152, at 65.

218. Because ACA officials are generally chosen from the ranks of experienced corrections officials, for example, “personal and professional relationships between ACA overseers and prison management are not uncommon, creating a common sympathy and sense of purpose that tells against both more meaningful standards and more rigorous enforcement.” Dolovich, *supra* note 7, at 492. Moreover, Dolovich argues that because the institutions pay for accreditation, thereby “providing income on which the ACA is dependent for its survival . . . a degree of capture is likely.” *Id.* (citation omitted).

219. *Id.* at 490-491 (acknowledging benefits of ACA accreditation of prisons); Kinney, *supra* note 152, at 65 (acknowledging benefits of JCAHO accreditation of hospitals).

220. To be sure, the Federal Acquisition Regulation does require the evaluation of all contracts in excess of \$1,000,000, 48 C.F.R. § 42.1502 (2006), and also requires contract officers to take into account the past performance of contractors in all competitively negotiated acquisitions expected to exceed \$1,000,000. 48 C.F.R. § 15.304(c)(3) (2006). Thus, in theory, an internal “blacklist” of rogue contractors could be created to guard against repeat abuses. But such an internal system hardly substitutes for independent accreditation.

221. *See, e.g.*, U.N. Global Compact, <http://www.unglobalcompact.org/abouttheGC/index.html> (May 17, 2005) (program, launched by U.N. Secretary-General Kofi Annan, to encourage corporations to agree voluntarily to respect nine principles, including the protection of human rights and the environment); David Stout, *Oil and Mining Leaders Agree To Protect Rights in Remote Areas*, N.Y. TIMES, Dec. 21, 2000, at A9 (describing agreement among oil and mining companies, the British and U.S. governments, and human rights organizations, providing that companies will voluntarily comply with human rights standards).

222. *See* THE SPHERE PROJECT, HUMANITARIAN CHARTER AND MINIMUM STANDARDS IN DISASTER RESPONSE (2004), *available at* http://www.sphereproject.org/handbook/hdbkpdf/hdbk_hc.pdf [hereinafter SPHERE CHARTER].

223. *See* IPOA Code of Conduct, <http://www.ipoaonline.org/conduct/> (Mar. 31, 2005).

receiving the contracts be vetted or accredited by independent organizations. For example, unlike domestic prison contracts, which routinely require accreditation by ACA and compliance with a comprehensive set of standards, the contracts with CACI to provide interrogators at Abu Ghraib contain only the most basic guidelines and make no mention of human rights compliance or accreditation requirements.²²⁴ The contract between the U.S. government and Dyncorp to provide law enforcement advisers to train Iraqi police similarly contains no provision mandating that Dyncorp be accredited,²²⁵ even though Dyncorp employees were implicated in sex abuse when performing under a similar contract in Bosnia.²²⁶ Likewise, although contracts could require that humanitarian aid organizations agree to the SPHERE guidelines in order to receive contracts, no such requirement has been imposed.²²⁷

Yet, such accreditation would seem to be particularly important in the foreign affairs area, where, as discussed previously, security concerns and special considerations often eliminate competition in the contracting process, resulting in contracts that are structured without the usual market controls. Significantly, the problem is not only that international organizations and domestic governments neglect to require accreditation in their contracts, but also that NGOs and other independent groups have not sought a robust accreditation role. After all, more NGOs could, like the SPHERE Project's efforts in humanitarian aid, begin to rate military contractors independently, regardless of whether the government contracts require such accreditation. These ratings might then become an industry standard that the government could be persuaded to use as a contracting factor. This is what occurred with NCQA in the domestic health care context. And, even if agency officials negotiating contracts choose not to impose accreditation requirements, the ratings could serve as a point of pressure in Congress and the public at large. Thus, NGOs should spend at least as much energy developing accreditation regimes as they do pursuing transnational litigation under various formal international law instruments. International organizations could also seek to create accreditation regimes. Such accreditation would likely be influential over time, even if states at first formally refuse to implement accreditation requirements into their contracts.

F. *Mandating Contractor Self-Evaluation*

Contractors could also be required to perform self-evaluations as a way of enhancing accountability. Presented with an internal self-evaluation, an outside monitor, whether governmental or third-party, can often scrutinize the

224. See Work Orders, *supra* note 137.

225. See Agreement Between U.S. Dep't of State and Dyncorp, Iraq Law Enforcement, No. SLMAQM-03-C-0028 (Apr. 18, 2003), available at <http://www.publicintegrity.org/docs/wow/DynCorp.pdf>.

226. See Yeoman, *supra* note 84, at A19.

227. See SPHERE CHARTER, *supra* note 222. Although SPHERE itself is a project of the not-for-profit sector, see <http://www.sphereproject.org> (listing representatives of not-for-profits and governments as board members), nothing prevents contracting agencies from requiring for-profit entities as well to follow SPHERE guidelines in fulfilling contracts.

contractor's performance more quickly and efficiently. Of course, self-evaluation gives the contractor discretion to massage the data and indeed can be subject to outright manipulation and abuse.²²⁸ But nonetheless, it can be a useful starting point for outside monitors, who can at least at the outset make a faster assessment as to whether the contractor has met the contract goals. In addition, self-evaluation can encourage more effective internal policing by the contractor.

Due to these potential benefits, self-evaluation has emerged as a frequent tool in the domestic context. In the world of private prisons, for example, contractors regularly are subjected to self-evaluation requirements. In Texas, prison contractors must "establish performance measures for rehabilitative programs and develop a system to assess achievement and outcomes."²²⁹ Likewise in the field of health care, a health maintenance organization must, if it is to receive accreditation, conduct continuous "quality improvement," in an ongoing internal self-evaluation process.²³⁰ Contracts that require accreditation thus effectively mandate such self-evaluation.

In the foreign affairs context, private foreign aid providers operating under agreement with USAID are regularly required to perform self-evaluation, but foreign aid contracts provided through other agencies and military contracts seem to be devoid of such provisions. Again, taking the publicly available Iraq contracts as an example, none requires the private contractor to file self-evaluation reports, develop internal assessment practices, or otherwise engage in self-evaluation.²³¹ And while self-evaluation on its own is unlikely to significantly improve contract compliance, such self-evaluation can be useful in combination with some or all of the other contractual provisions discussed in this Article.

G. *Enhancing Governmental Termination Provisions and Allowing for Partial Governmental Takeover of Contracts*

Contracts could also include terms allowing the relevant government (or international organization) to take over the contract by degrees before ultimately terminating the agreement for failure to observe provisions implementing public law values. Currently, most contracts have implied or explicit provisions allowing only for outright termination for noncompliance. On its face this sort of termination provision seems as if it would provide a strong incentive for contractor compliance. In actual practice, however, outright termination is such an extreme measure that governments are often reluctant to invoke it, and because contractors know that termination is so unlikely, the provisions have almost no disciplining effect.

228. *See id.*

229. *See* Freeman, *supra* note 18, at 634-35 (describing contract between private corporation and the Texas Dep't of Criminal Justice).

230. *See, e.g.,* NCQA, What Does NCQA Review When It Accredits an HMO?, <http://www.ncqa.org/Programs/Accreditation/mco/mcostdsoverview.htm> (last visited Mar. 29, 2006).

231. *See* Contracts and Reports, *supra* note 135.

Thus, it would be better if such termination provisions were supplemented with more graduated penalties, such as provisions permitting the partial governmental takeover of contracts. Because graduated penalties are less extreme than outright termination, they are far more likely actually to be invoked by contract monitors, making them a more effective enforcement mechanism than the harsher (though rarely invoked) termination provisions. Moreover, if partial takeover fails to stem the abuses, outright termination still remains a penalty of last resort. In the domestic context, states are increasingly turning to mechanisms such as graduated penalties, for example, to increase oversight of private nursing homes receiving public funding.²³² Scholars and practitioners have also called for the use of such penalties in the private prison setting.²³³

Turning to foreign affairs, while contracts subject to the FAR do contain termination provisions, they are rarely exercised and are not supplemented by lesser, graduated penalties. As a result, the government has little leverage over contractors. The Iraq contracts provide a notable demonstration of this problem. When CACI employees were implicated in abuses at Abu Ghraib prison, for example, the U.S. government did not terminate its contract. Indeed, although the particular employees implicated in the abuse charges no longer work at CACI,²³⁴ it is unclear whether government actors even so much as stepped up their supervision of the contracts. To the contrary, CACI actually received a contract *extension* for interrogation services.²³⁵

Obviously, governments (and international organizations) should be encouraged to invoke termination provisions when contractors fall short. But even without full termination of the contractors, graduated government (or international organization) takeover could provide an added incentive for contractors to promote public law values.

H. *Allowing for Beneficiary Participation or Broader Public Involvement in Contract Design*

Contracts could also permit beneficiaries or the broader public to help shape contract terms and evaluate performance. In the domestic context, commentators have suggested that such beneficiary participation or involvement by the broader public could greatly enhance the extent to which contractors fulfill public law values.²³⁶ Indeed, as Fred Aman has argued, precisely because privatization contracts are difficult to terminate and

232. Freeman, *supra* note 18, at 608.

233. *Tale of Two Systems*, *supra* note 182, at 1888; see also Alphonse Gerhardstein, *Private Prison Litigation: The "Youngstown" Case and Theories of Liability*, 36 CRIM. L. BULL. 183, 198 (2000).

234. See CACI, CACI in Iraq: Frequently Asked Questions, http://www.caci.com/iraq_faqs.shtml (last visited May 21, 2005) [hereinafter CACI in Iraq]; News Release, CACI, CACI Says the Fay Report Clearly Shifts Focus of Blame Away From Its Employee Named in a Previous Report (Aug. 26, 2004), available at http://www.caci.com/about/news/news2004/08_26_04_NR.html.

235. See CACI in Iraq, *supra* note 234.

236. Jody Freeman, for example, has suggested that, in order to protect public law values, "perhaps interested individuals, or representative groups should be entitled to participate in contract negotiation." Freeman, *supra* note 18, at 668.

sometimes become “immutable,” it is “important that the participation of the public and the public’s representatives be maximized as early in the process as possible.”²³⁷ He thus advocates allowing the broader public to play a role in the design of the contracts themselves.²³⁸

Some state and local governments have begun to do so. For example, Wisconsin’s contracts with managed care organizations to provide health care to Medicare and Medicaid recipients include provisions for participation by community groups.²³⁹ Other states have gone even further and now require broad public involvement in virtually all privatization decisions. In Montana, for example, any privatization decision must be made subject to a plan available to the public and open to public comment.²⁴⁰ Other states have similar provisions.²⁴¹

Foreign affairs contracts might benefit from this approach. Indeed, such participation may be particularly important to promote public law values because the ordinary democratic process open to those experiencing the effects of privatization in the domestic context is essentially unavailable for non-citizens outside the United States who are affected by the activities of contractors. To be sure, even in the domestic context, there has long been a worry that privatization removes a crucial democratic check on government. The link between those affected by government action and the government actors is attenuated when that activity is farmed out first from legislatures to agencies, and then from agencies to private contractors. Scholars and policy-makers worry that this form of delegation reduces transparency, which in turn reduces the ability of those affected to vote their preferences when things are not going well.²⁴² But when governments turn to private contractors to perform foreign affairs functions, the problem is increased exponentially because many of the people affected by the contracts in question do not belong to the U.S. democratic polity or indeed any democratic polity at all. Moreover, U.S. citizens may be less inclined to use the democratic process to voice their views when the effects of contracting are felt mainly overseas.

While it may make less sense to allow involvement of those non-citizens affected by military contractors overseas, due to obvious security concerns, beneficiary involvement or broader public participation in the design and evaluation of foreign aid contracts might be particularly useful. Governments providing long-term development aid through private organizations have to some degree already begun to adopt this approach. In the United States,

237. AMAN, *supra* note 33, at 155.

238. *See id.* at 155-56 (critiquing a number of state privatization statutes for failing to provide adequate provisions for public participation in the design of contracts).

239. *See* Freeman, *supra* note 18, at 624-25.

240. MONT. CODE ANN. § 2-8-302 (2005).

241. For a discussion of such provisions, see AMAN, *supra* note 33, at 154-56.

242. *See, e.g.,* Jonathan Turley, *The Military Pocket Republic*, 97 NW. U. L. REV. 1, 72 (2002) (“This layer of agencies creates obvious problems for theories of democracy that emphasize the ability of citizens to influence their government through participatory action or deliberative process.”). *But see* Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1542 (1992) (arguing that agencies, because they fall between the extremes of a “politically over-responsive Congress and the over-insulated courts,” may be best situated to institute a civic republican model of policymaking).

USAID has allowed local beneficiaries and NGOs to help design development aid agreements, usually on an informal basis, and most frequently when such agreements are negotiated through field offices.²⁴³ Agencies other than USAID, however, are less likely to engage in such consultation.²⁴⁴ Humanitarian aid and post-conflict reconstruction assistance are also less likely to incorporate such an approach, though recently the UNHCR has begun to explore the possibility of refugee and internally displaced person evaluation of humanitarian aid.²⁴⁵

I must leave to a future article a more detailed discussion of how best to maximize opportunities for those affected by a foreign aid project to participate in the design of that project.²⁴⁶ Certainly, the idea raises a whole host of practical problems. For example, it will be difficult to determine who exactly can speak for an affected population. Is NGO participation sufficient? How does one determine which civil society actors are most representative? What if different sectors of the population disagree as to the efficacy of a proposed project? Even assuming one determines the appropriate voices, what form should the feedback take? Is informal consultation enough? Or should there be a more formal notice and comment period? Or is it necessary to establish an independent tribunal with the power to quash the project altogether? And should such a tribunal be governmental or private? While these questions certainly must be addressed, it seems to me that if we are asking them, we will have already advanced the debate quite a bit. The important point for now is that we must at the very least begin to explore ways of involving in the contracting process itself those affected by foreign affairs agreements. Explicit contractual requirements would go a long way toward facilitating consultation with beneficiary populations, thereby effectuating through contract a broader form of public participation.

I. *Strengthening Enforcement Mechanisms*

Finally, the contracts could provide for enhanced enforcement mechanisms. They could, for example, give beneficiaries the opportunity for privatized administrative hearings. Additionally, contracts might include third-party beneficiary suit provisions, empowering contract beneficiaries or other interested parties to sue in domestic courts for breach of contract. And whistleblower protections might be enhanced. All of these measures would likely increase compliance with contractual terms.

In the domestic context, governments and policymakers have begun to implement such measures, though private grievance procedures remain more prevalent than broader third-party beneficiary suit provisions and

243. See generally Tania Kaiser, *Participation or Consultation? Reflections on a 'Beneficiary Based' Evaluation of UNHCR's Programme for Sierra Leonean and Liberian Refugees in Guinea, June-July 2000*, 17 J. REFUGEE STUD. 185, 186 (2004) (discussing ways to facilitate measuring the impact of aid programs).

244. See *id.*

245. See *id.*

246. See Laura Dickinson, *Privatization and Public Participation in Foreign Affairs* (2006) (unpublished manuscript, on file with the author).

whistleblower protections. Commentators regularly call for an expansion of third-party beneficiary suit provisions²⁴⁷ (which courts generally refuse to imply unless clearly specified in the contract),²⁴⁸ but such provisions remain rare. Many private contractors providing aid, however, do offer individual complaint mechanisms for affected beneficiaries.²⁴⁹ Although these aid providers are not state actors and would therefore generally be immune from constitutional review, such contractual provisions do allow for notice and opportunity to be heard, thereby incorporating elements of constitutional due process. These private grievance systems are perhaps most evident in contracts with private prison operators, which typically require such mechanisms.²⁵⁰ But they appear in other contexts as well, such as health care. For example, the Medicare statute requires that health maintenance organizations receiving federal funding to cover their treatment of Medicare beneficiaries must “provide meaningful procedures for hearing and resolving grievances between the organization . . . and members enrolled.”²⁵¹

Governments might experiment with similar measures in the foreign affairs arena.²⁵² The World Bank has taken steps in this direction, by enabling aid beneficiaries to bring grievances before special tribunals challenging gross abuses.²⁵³ Third-party beneficiary suit provisions, however, are virtually nonexistent, and none of the Iraq contracts contains such a provision. Whistleblower protections should also be enhanced. Government officials currently receive whistleblower protection for reporting abuses in the negotiation or management of contracts, but employees of private companies are not protected under the general Whistleblower Protection Act.²⁵⁴ In specific statutes, however, Congress has at times extended whistleblower protection to private employees. For example, seven of the major federal

247. See, e.g., Freeman, *supra* note 11, at 1317.

248. For example, section 313(2) of the Restatement (Second) of Contracts provides “[A] promisor who contracts with a government or governmental agency to do an act for or render a service to the public is not subject to contractual liability to a member of the public for consequential damages resulting from performance or failure to perform unless (a) the terms of the promise provide for such liability; or (b) the promisee is subject to liability to the member of the public for the damages and a direct action against the promisor is consistent with the terms of the contract and with the policy of the law authorizing the contract and prescribing remedies for its breach.” RESTATEMENT (SECOND) OF CONTRACTS § 313(2) (1981). For further discussion of third-party beneficiary suits involving government contracts, see Melvin Aron Eisenberg, *Third-Party Beneficiaries*, 92 COLUM. L. REV. 1358, 1406-12 (1992).

249. See Metzger, *supra* note 7, at 1494.

250. For examples of contracts with private operators that require grievance procedures, see Florida Contract, *supra* note 132, § 5.24; Oklahoma Contract, *supra* note 132, § 5.15; Freeman, *supra* note 18 (describing Texas Contract).

251. 42 U.S.C. § 1395mm(c)(5)(A) (2000).

252. Such experiments might focus, at least initially, on those contracts deemed most vulnerable to serious abuses.

253. See Lori Udall, *The World Bank and Public Accountability: Has Anything Changed?*, in THE STRUGGLE FOR ACCOUNTABILITY: THE WORLD BANK, NGOS, AND GRASSROOTS MOVEMENTS 391, 392-93 (Jonathan A. Fox & L. David Brown eds., 1998).

254. 5 U.S.C. § 2302 (1989). While it is true that such employees could bring a *qui tam* action for fraud, 31 U.S.C. § 3730(b)(1), (c), (d), (h) (2000), such a suit would do nothing to protect the employee from being fired.

environmental statutes contain such whistleblower clauses.²⁵⁵ Thus, whistleblower protection could also be extended to private sector employees working for a government contractor, who provide information concerning the unlawful performance of a contract. Such a provision, combined with the availability of third-party beneficiary suits, or possibly even *qui tam* actions,²⁵⁶ would go a long way towards making sure that any contract-based efforts to provide accountability will have back-end enforcement to encourage compliance.

As discussed previously, enforcing international law norms through contract, rather than directly in an international forum, obviates any need to argue that the contractor should be deemed a state actor. In addition, because international law enforcement mechanisms are relatively weak compared to their domestic counterparts, a contractual approach is far more likely to lead to meaningful judicial review. In addition, requiring domestic judges to enforce international public law values embodied in contracts may have important norm internalization effects because such judges would essentially be enforcing international law norms.²⁵⁷ This increased familiarity with international law principles might lead to less resistance to those norms as a general matter, thereby effectively expanding the reach of international law.

On the other hand, one might argue that localizing the enforcement of international law norms might either cause international enforcement mechanisms to atrophy from disuse or lead to heterogeneity in different countries' understandings of the principles, which could undermine the notion of a common international law. Neither objection, however, should create serious hesitation about pursuing contractual accountability. First, as previously discussed, international law enforcement mechanisms are already weak, and to the extent that they have been effective, at least in the human rights context, it has been by selectively limiting the scope of enforcement to the very most egregious human rights violators. Thus, it is not at all clear that providing a possibly effective domestic avenue for pursuing claims against private actors (who would have been unlikely to face prosecution internationally in any event) will in any meaningful way undermine international law institutions. Second, to the extent that domestic judicial systems, government officials, and broader populations internalize international law norms, it strikes me that the benefits of such norm internalization far outweigh any possible concern about maintaining the "purity" of the international norm. Local variation is to be expected, of course,

255. See Toxic Substance Control Act § 23, 15 U.S.C. § 2622 (2000); Federal Water Pollution Control Act Amendments of 1972 § 2, 33 U.S.C. § 1367 (2000); Clean Air Act Amendments of 1977 § 312, 42 U.S.C. § 7622 (2000); Comprehensive Environmental Response, Compensation & Liability Act of 1980 § 110, 42 U.S.C. § 9610 (2000); Safe Drinking Water Act § 2, 42 U.S.C. § 300j-9(i) (2000); Resource Conservation and Recovery Act of 1976 § 2, 42 U.S.C. § 6971 (2000); Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (2000) (amended 1978, 1992).

256. See *supra* note 117 (describing such an action against Custer Battles, LLC, an Iraq contractor).

257. See, e.g., Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996) (arguing that international law is often enforced through the domestic internalization of international law norms).

but such heterogeneity in the domestic incorporation of international norms strikes me as a strength, not a weakness. Finally, the key point is that without focusing on contracts, there may be no realistic way to impose norms of accountability on privatized foreign affairs activity at all. Accordingly, those seeking to expand the applicability of international law norms should at the very least seriously consider using contractual enforcement mechanisms or risk the possibility that such norms will simply be ignored in an increasingly privatized world.

IV. CONCLUSION

Resisting privatization in the foreign affairs context is probably no longer an option. Indeed, if anything the scope and pace of privatization in the international arena is increasing. Moreover, it will not be sufficient merely to tweak existing international law treaties or doctrines (or even invent new ones) in order to bring private contractors within the ambit of formal international law. After all, even if international or domestic courts could be convinced that private contractors should be held liable for violation of international law norms (which is far from certain), international and transnational public law litigation will never be able to hold accountable more than a handful of people. Accordingly, those who seek to preserve or expand the values embodied in public international law will also need to look elsewhere to find mechanisms for ensuring accountability in a privatized world.

In this Article, I have suggested one such mechanism: the government contract that creates the privatized relationship in the first place. Drawing on the far more extensive domestic administrative law literature on the subject, I have identified a variety of provisions that could be incorporated into such contracts. These provisions seek to encourage compliance with (and enforcement of) human rights and humanitarian law, ensure transparency and democratic accountability, and promote norms against corruption, waste, and fraud. Taken together, they provide a menu of options for regulators, activists, policymakers, and scholars who are concerned at the potential for abuse in our current contracting processes.

Of course, governments may be hesitant to insist on some of these contractual provisions. For example, officials may fear that such requirements could unduly increase the costs of privatization both to the contractor and to the government entity overseeing the contract.²⁵⁸ Or, more cynically, resistance might stem from the fact that governments actually benefit from a more opaque process with less public oversight. In any event, one seeming difficulty with relying on contractual provisions is that the increased oversight

258. See, e.g., Jack M. Sabatino, *Privatization and Punitives: Should Government Contractors Share the Sovereign's Immunities from Exemplary Damages?*, 58 OHIO ST. L.J. 175, 191 (1997) (expressing concern that litigation and administrative costs could "siphon away public resources that could have been devoted to, among other things, the effective implementation and oversight of the contractors' work").

will be included in contracts only as a “matter of legislative or executive grace,” and therefore can be rescinded or limited at any time.²⁵⁹

Yet, such objections do not render a contractual approach unrealistic. To begin with, concerns about the cost of additional contractual requirements may well be over-stated. As the Custer Battles fiasco makes clear, in many cases better oversight could actually save the government far more money than it costs. And as to concerns that added contractual provisions will cause contractors to walk away or prohibitively raise their rates, the short answer is that far more empirical work must be done to assess whether such dire predictions are accurate. After all, it seems quite unlikely that contractors bidding for these extraordinarily lucrative contracts with governments such as the United States will pull out of the process just because of some added contract requirements. To the contrary, the government should, by all rights, have tremendous leverage in the contracting process because there are unlikely to be competing customers similarly able to offer billions of dollars in contract awards. Indeed, while government contractors in the past have often raised concerns about increased compliance costs to object to enhanced contractual oversight,²⁶⁰ at least one commentator has challenged such claims, noting the absence of compelling evidence that increased oversight through, for example, *qui tam* suits has resulted in a significant number of firms refusing to do business with the government.²⁶¹

In addition, while some governmental officials surely would prefer a more opaque process, governments are not monolithic entities, and proposals such as the ones outlined in this Article may be taken up and championed by members of the bureaucracy, even without the imprimatur of higher level executive branch officials or the legislature. Moreover, it is incorrect to think that more robust contractual monitoring can only come about through official executive branch or legislative action. First of all, some of the proposals for monitoring of contracts and accreditation or rating of contractors could be undertaken by NGOs or other groups without any official action whatsoever. While such evaluations might not initially have the power of the state behind them, the example of NCQA indicates that, over time, governments can be convinced to adopt a previously unofficial rating system as its own. Second, even if governments never adopted the standards, simply the process of evaluating and accrediting contractors would provide a rich source of public information about privatization that could be used to bring popular political (or economic) pressure to bear on noncompliant contractors. Such public reporting might also allow citizen watchdog groups (or even competing contractors) to monitor the effectiveness of particular contracts, publicize

259. See Metzger, *supra* note 7, at 1404-05.

260. See, e.g., William E. Kovacic, *The Civil False Claims Act as a Deterrent to Participation in Government Procurement Markets*, 6 SUP. CT. ECON. REV. 201, 205 (1998) (reporting contractors' concerns that the specter of *qui tam* suits is “a costly, substantial burden of doing business with the government”).

261. See Stephen L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U. L. REV. 627, 668 n.137 (2001).

deficiencies, and lobby government officials for change.²⁶² Third, advocacy at the international level could result in treaties or other international regimes that actually require governments to include oversight provisions in certain categories of contracts, thus creating increasing pressure for change. In any event, as the domestic examples demonstrate, governments and agencies can, at least at times, be mobilized to require meaningful contractual oversight.

In the end, whatever the drawbacks of a contractual approach, they are certainly no greater than the weaknesses of the existing formal transnational/international court system. Indeed, the use of contractual provisions has the benefit of opening up the possibility of legal enforcement regardless of whether or not there is state action and to provide the foundation for legal action in domestic, as well as international, fora. Such contractual mechanisms might also pave the way for statutes and treaties. Thus, international law scholars, activists, and advocates should spend at least as much time studying and lobbying for contract-based compliance regimes as they do seeking further openings for international or transnational litigation.

Perhaps most importantly, we must remember that the proper management of privatization will almost certainly require a variety of approaches, and we need not choose one to the exclusion of others. My aim here is simply to focus attention on privatization in the international realm as a crucial field of study, to call for dialogue among international and domestic scholars, advocates, and policy-makers concerning appropriate responses, and to suggest that more attention be paid to the possibility of using contractual provisions to provide accountability. None of these aims requires that contract become the only response to privatization.²⁶³ To the contrary, in the coming years we will need to think broadly and creatively about how best to respond to the threats posed by the outsourcing of governmental functions to non-governmental entities. Only through such efforts will we be able to find ways

262. Indeed, as Bradley Karkkainen has pointed out, the Toxics Release Inventory (TRI), 42 U.S.C. § 11023 (2000), which requires that industrial facilities report the release and transfer of specific chemicals, has had a significant impact on pollution emissions. See Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257, 287-88 (2001). According to Karkkainen, the TRI, because it creates a performance metric, “both compels and enables facilities and firms to monitor their own environmental performance” and “encourages them to compare, rank, and track performance among production processes, facilities, operating units, and peer or competitor firms.” *Id.* at 261. In addition, Karkkainen argues that the TRI data “subjects the environmental performance of facilities and firms to an unprecedented degree of scrutiny by their peers, competitors, investors, employees, consumers, community residents, environmental organizations, activists, elected officials, regulators, and the public in general.” *Id.* at 261-62. As a result, this transparency scheme “unleashes, strengthens, and exploits multiple pressures, all tending to push in the direction of continuous improvement as facilities and firms endeavor to leapfrog over their peers to receive credit for larger improvements or superior performance.” *Id.* at 262. In addition, administrators—whether within companies or in government bureaucracies monitoring contract compliance—have a management incentive to improve transparency. *Id.* at 295-305. Thus, although information by itself does not provide accountability, see *id.* at 338-43 (noting that some small firms may be unconcerned about the mere release of information), it can enable other accountability mechanisms.

263. Indeed, I see contract as one of an array of accountability mechanisms—including the formation of a treaty regime, litigation, statutory reform, political accountability, and internal organizational sanctions—each of which merits further exploration and study.

to protect crucial public law values in the era of privatization that is already upon us.